**FEDERAL MINE SAFETY AND HEALTH REVIEW COMMISSION**
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June 21, 2011

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| SECRETARY OF LABOR, | : | CIVIL PENALTY PROCEEDINGS |
| MINE SAFETY AND HEALTH | : | |
| ADMINISTRATION (MSHA), | : | Docket No. LAKE 2009-569 |
| Petitioner, | : | A.C. No. 12-02010-188272-02 |
| | : | |
| v. | : | Docket No. LAKE 2009-570 |
| | : | A.C. No. 12-02010-188272-03 |
| | : | |
| BLACK BEAUTY COAL COMPANY, | : | |
| Respondent. | : | Mine: Air Quality #1 Mine |

**DECISION**

Appearances: Awilda Marquez, Pam Mucklow, Office of the Solicitor, U.S. Department of Labor, Denver, Colorado, for Petitioner;
Arthur Wolfson, Dana Svendson, Jackson Kelly, Pittsburgh, Pennsylvania, for Respondent.

Before: Judge Miller

These cases are before me on a petition for assessment of civil penalty filed by the Secretary of Labor, acting through the Mine Safety and Health Administration, against Black Beauty Coal Company at its Air Quality #1 Mine, pursuant to sections 105 and 110 of the Federal Mine Safety and Health Act of 1977, 30 U.S.C. §§ 815 and 820 (the "Mine Act" or "Act"). The two dockets captioned above , which are the subject of this decision, were heard along with four other dockets, LAKE 2009-470, 471, 565 and 612, and share a common transcript and exhibits. Docket Nos. LAKE 2009-470, 471, 565 and 612, are addressed in two other decisions. With the exception of the fifteen citations and orders discussed below, the parties have agreed to settle all citations and orders in the captioned dockets. The settlement terms are set forth at the end of this decision. The parties presented testimony and documentary evidence at the hearing held in Evansville, Indiana commencing on February 15, 2011.

## I. FINDINGS OF FACT AND CONCLUSIONS OF LAW

Black Beauty Coal Company, ("Black Beauty") operates the Air Quality #1 mine (the "mine"), a bituminous, underground coal mine, near Vincennes, Indiana. The mine uses a continuous miner and utilizes the room and pillar method. (Tr. 15). The mine is subject to

regular inspections by the Secretary's Mine Safety and Health Administration ("MSHA") pursuant to section 103(a) of the Act. 30 U.S.C. § 813(a). The parties stipulated that Black Beauty is the operator of the mine, that the mine's operations affect interstate commerce, and that it is subject to the jurisdiction of the Mine Act. Jt. Ex. 1; (Tr. 587-588). Black Beauty Coal, like a number of other mines in the Indiana-Illinois area, is owned by Peabody Energy. The mine is a large operator.

A. Common Facts and Law

In addition to the penalty criteria and jurisdictional matters, there are a number of facts that are common to the citations and orders discussed below. The parties have agreed that each of them is "free to argue that evidence admitted in the context of a particular Citation or Order is relevant to the court's determination of other Citations and Orders. Further, if the Court accepts the party's argument, the Court may consider that evidence in reaching her decision concerning those other Citations and Orders." Jt. Ex. 1, Stip. 11. I have used the transcript in it's entirety in addressing citations and orders.

At the time the subject citations and orders were issued the mine had been on the (d)(2) series for an extended period of time. Each inspector who testified indicated that this mine has had a number of serious, ongoing problems. The primary ongoing problem has been accumulations, including coal, float coal dust, and oil. The mine has also had chronic issues with keeping the accumulations out of the belt areas, and keeping the ventilation in place to prevent exposure to dust. This mine has a greater than normal number of permissibility violations. All inspectors credibly testified that the mine was on notice, both from past violations and meetings with management, that it should be paying attention to the violations related to accumulations, ventilation plans, roof control plans, and dust exposure.

The mine is on a 103(I) five day spot inspection due to the large quantities of methane liberated. The mine argues that the methane is primarily emitted at the sealed areas. Nevertheless, the mine is considered a gassy mine. During the time frame that many of these citations and orders were issued, from March 30, 2009 until June 29, 2009, the mine received 271 citations and 11 orders. Sec'y Ex. 60. The mine history shows that, in the less than one year period prior to when the subject violations were issued, the mine received 102 citations and orders for accumulations violations, Sec'y Ex. 63, and 47 citations and orders for permissibility violations, Sec'y Ex. 64. Further, a number of the subject violations were issued in February 2009. The history also shows 234 violations of accumulation standards in the prior two year period. Sec'y Ex. 69. Finally, the history shows that, from March 2007 to March 2009, there were a large number of permissibility, accumulations, ventilation and roof violations, all or which are all very serious hazards. Sec'y Ex.71. During testimony, each of the inspectors who issued the subject violations found that the violations were obvious and should have been discovered prior to the inspection by either a preshift examination, an onshift examination, or during the regular course of mining.

The majority of the orders and citations discussed below have been designated as significant and substantial. A significant and substantial ("S&S") violation is described in section 104(d)(1) of the Act as a violation "of such nature as could significantly and substantially contribute to the cause and effect of a coal or other mine safety or health hazard." 30 U.S.C. § 814(d)(1). A violation is properly designated S&S "if, based upon the particular facts surrounding that violation, there exists a reasonable likelihood that the hazard contributed to will result in an injury or illness of a reasonably serious nature." *Cement Div., Nat'l Gypsum Co.*, 3 FMSHRC 822, 825 (Apr. 1981). The Commission has explained that:

> [i]n order to establish that a violation of a mandatory safety standard is significant and substantial under National Gypsum, the Secretary of Labor must prove: (1) the underlying violation of a mandatory safety standard; (2) a discrete safety hazard--that is, a measure of danger to safety--contributed to by the violation; (3) a reasonable likelihood that the hazard contributed to will result in an injury; and (4) a reasonable likelihood that the injury in question will be of a reasonably serious nature.

*Mathies Coal Co.*, 6 FMSHRC 1, 3-4 (Jan. 1984) (footnote omitted); *see also, Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135 (7th Cir. 1999); *Austin Power, Inc. v. Secretary*, 861 F.2d 99, 103-04 (5th Cir. 1988), *aff'g Austin Power, Inc.*, 9 FMSHRC 2015, 2021 (Dec. 1987) (approving Mathies criteria).

The difficulty with finding a violation S&S normally comes with the third element of the Mathies formula. In *U.S. Steel Mining Co., Inc.*, 7 FMSHRC 1125, 1129 (Aug. 1985), the Commission provided additional guidance:

> We have explained further that the third element of the Mathies formula "requires that the Secretary establish a reasonable likelihood that the hazard contributed to will result in an event in which there is an injury." U.S. Steel Mining Co., Inc., 6 FMSHRC 1834, 1836 (August 1984). We have emphasized that, in accordance with the language of section 104(d)(1), it is the contribution of a violation to the cause and effect of a hazard that must be significant and substantial. U.S. Steel Mining Co., Inc., 6 FMSHRC 1866, 1868 (August 1984); U.S. Steel Mining Co., Inc., 6 FMSHRC 1573, 1574-75 (July 1984).

This evaluation is made in consideration of the length of time that the violative condition existed prior to the citation and the time it would have existed if normal mining operations had continued. *Elk Run Coal Co.*, 27 FMSHRC 899, 905 (Dec. 2005); *U.S. Steel Mining Co., Inc.*, 6 FMSHRC at 1574. Further, the question of whether a violation is S&S must be based on the particular facts surrounding the violation. *Texasgulf, Inc.*, 10 FMSHRC 498 (Apr. 1988);

*Youghiogheny & Ohio Coal Co.*, 9 FMSHRC 2007 (Dec. 1987).

In addition to being designated S&S, many of the citations and orders were designated as an unwarrantable failure or attributable to high negligence. The term "unwarrantable failure" is defined as aggravated conduct constituting more than ordinary negligence. *Emery Mining Corp.*, 9 FMSHRC 1997, 2004 (Dec. 1987). Unwarrantable failure is characterized by such conduct as "reckless disregard," "intentional misconduct," "indifference," or the "serious lack of reasonable care." *Id*. at 2004-04; *Rochester & Pittsburgh Coal Co.*, 13 FMSHRC at 193-94. Aggravating factors include the length of time that the violation has existed, the extent of the violative condition, whether the operator has been placed on notice that greater efforts were necessary for compliance, the operator's efforts in abating the violative condition, whether the violation was obvious or posed a high degree of danger, and the operator's knowledge of the existence of the violation. *See Consolidation Coal Co.*, 22 FMSHRC 340, 353 (Mar. 2000); *Mullins & Sons Coal Co.*, 16 FMSHRC 192, 195 (Feb. 1994); *Windsor Coal Co.*, 21 FMSHRC 997, 1000 (Sept. 1999); *Consolidation Coal Co.*, 23 FMSHRC 588, 593 (June 2001). All of the relevant facts and circumstances of each case must be examined to determine if an actor's conduct is aggravated, or whether mitigating circumstances exist. *Consol*, 22 FMSHRC at 353.

I rely on the cited case law when considering the citations and orders discussed below, particularly with respect to the issues of S&S and unwarrantable failure. The findings of fact are based on the record as a whole and my careful observation of the witnesses during their testimony. In resolving any conflicts in testimony, I have taken into consideration the interests of the witnesses, corroboration, or lack thereof, and consistencies or inconsistencies, in each witness' testimony and between the testimonies of witnesses. In evaluating the testimony of each witness, I have relied on his or her demeanor. Any failure to provide detail on each witness's testimony is not to be deemed a failure on my part to have fully considered it. The fact that some evidence is not discussed does not indicate that it was not considered. *See Craig v. Apfel*, 212 F.3d 433,436 (8th Cir. 2000) (administrative law judge is not required to discuss all evidence and failure to cite specific evidence does not mean it was not considered).

Finally, there are a number of citations that were issued based upon a safeguard for clear walkways along the side of each belt. I have already ruled on the validity of the underlying safeguard. As a result, two of the citations that remain at issue were not addressed at hearing and, instead, the parties stipulated that " the only defenses . . . [Black Beauty is] raising concerning Citations 8415372 and 8415373 are (1) the Citation must be vacated because the underlying Safeguard is invalid and (2) the Court could not find the violations to be significant and substantial because safeguards are not mandatory standards." Jt. Ex. 1, Stip. 15. The parties further "stipulate that neither will present evidence particular to Citations 8415372 and 8415373." *Id.* at Stip. 16.

B. Docket No. LAKE 2009-569

This docket contains five violations with a total proposed penalty of $73,045. The parties

have agreed to settle one of the violations. The remaining violations are addressed below. The terms of the settlement are addressed near the end of the decision.

1. *Citation No. 9942563*

On April 9, 2009, Inspector Charles Weilbaker issued citation number 9942563 for a violation of section 70.100(a). The citation, in pertinent part, alleges the following:

> The average concentration of respirable dust in the working environment of the designated occupation was 2.691 milligrams per cubic meter which exceeds the 2.0 milligrams per cubic meter standard. This finding was based on the results of five (5) valid dust samples collected by the operator. The operator shall take corrective action to lower the respirable dust.

The inspector found that a permanently disabling injury was reasonably likely to occur, that the violation was significant and substantial, that six persons would be affected, and that the violation was the result of high negligence.

The cited standard requires the following:

> Each operator shall continuously maintain the average concentration of respirable dust in the mine atmosphere during each shift to which each miner in the active workings of each mine is exposed at or below 2.0 milligrams of respirable dust per cubic meter of air as measured with an approved sampling device and in terms of an equivalent concentration determined in accordance with §70.206 (Approved sampling devices; equivalent concentrations).

30 C.F.R. § 70.100. The Secretary has proposed a civil penalty in the amount of $42,600.

a. **The Violation**

Inspector Ron Hayes, the health supervisor in MSHA Vincennes office, has been with MSHA for 22 years. He was a member of the team of "dust busters" sent to the mine to address issues of respirable dust. Hayes supervises the dust and noise groups and reviews the dust violations for the mines in his district. (Tr. 183-185).

According to Hayes, in each dust case, including the one here, the violation for an overexposure to dust is based upon the average of five valid samples collected by the mine operator and sent to the MSHA lab for analysis. The results are entered into a computer and the district office is notified. The mine receives an advisory if it is out of compliance and the district

office issues a violation. At this mine the maximum allowable respirable dust exposure is 2.0 milligrams per cubic meter in an eight hour period. The hazard associated with exposure to respirable dust is that, in the case of coal dust, it will be brought into the lungs, cause damage, and eventually lead to "black lung." The greater the exposure, the greater the hazard. The samples are taken for designated miner occupations. Here, the samples are those for the continuous miner operator. (Tr. 186-188).

Several witnesses testified on behalf of the mine operator, however, there is no dispute that the weighted samples demonstrated an overexposure, i.e,. the average weighted samples exceeded the 2.0 limit. While Mr. Polston and others at the mine expressed their opinion that the manner in which the Pittsburgh lab weights the samples results in inaccurate results, there is no evidence that the testing was faulty. The five weighted dust samples collected by the mine demonstrated an exposure over the 2.0 milligrams per cubic meter limit allowed by the MSHA standards. Accordingly, I find that a violation has been established.

b. **Significant and Substantial**

This case involves a mandatory health standard as opposed to a safety standard. In *Consolidation Coal Co.*, 8 FMSHRC 890 (June 1986), *aff'd* 824 F.2d 1071 (D.C. Cir. 1987), the Commission applied the *Mathies* test to a violation of a mandatory health standard. The Commission stated the following:

> Adapting this test to a violation of a mandatory health standard, such as section 70.100(a), results in the following formulation of the necessary elements to support a significant and substantial finding: (1) the underlying violation of a mandatory health standard; (2) a discrete health hazard--a measure of danger to health--contributed to by the violation; (3) a reasonable likelihood that the health hazard contributed to will result in an illness; and (4) a reasonable likelihood that the illness in question will be of a reasonably serious nature.

*Id* at 897. The Commission went on to state the following:

> [G]iven the nature of the health hazard at issue [i.e., respirable dust induced disease], the potentially devastating consequences for affected miners, and strong concern expressed by Congress for eliminating respiratory illnesses in miners, . . . if the Secretary proves an overexposure to respirable dust in violation of § 70.100(a), based upon designated occupational samples, has occurred, a presumption arises that the third element of the "significant and substantial" test - - a reasonable likelihood that the health hazard contribute or will result in an illness - - has been

established.

*Id.* at 899.

Hayes testified that two of the tested samples showed dust levels that were double the allowable amount. The miners were exposed to these excessive levels of respirable dust for two shifts over the course of two days, and to relatively high levels on three other shifts. (Tr. 198). Hayes stated that this overexposure is S&S because it harms the lungs immediately, as well as in the long term by causing black lung.

I have already found that there is a violation of the mandatory health standard. Second, I find that a discrete safety hazard existed as a result of the violation, the danger of overexposure to respirable dust which causes significant lung damage. Third, there is a reasonable likelihood that the health hazard contributed to will result in an illness. The operator offered no evidence suitable to overcome the presumption that the exposure to dust would result in a serious injury. The mine focused on the ventilation that was in place on the day the citation was issued and the fact that they noticed nothing out of the ordinary. I find that operator has failed to rebut the presumption discussed above. The Respondent's witness testimony primarily focused on the negligence attributed to the violation, and not the S&S nature. Fourth, the illness will be serious. The damage to the lung is permanent and irreversible and will eventually lead to death. In light of the foregoing analysis, I find that the violation was properly designated S&S.

c. **Negligence**

Weilbaker designated the citation as high negligence. According to Hayes, the designation was based on the previous history of violations and the existence of several trigger samples that came back as overexposed. Hayes testified that, given that the high level of dust should have been visible in the air and therefore, the mine foreman should have known that the dust concentration was high. Further, Hayes opined that, even if the mine was adhering to the approved ventilation plan when the samples were taken, the mine should have seen the large quantities of dust in the air given that two samples demonstrated exposure of more than double the allowable limit. (Tr. 194-196, 199, 208). Inititally, Hayes did not clarify when the earlier exposures occurred. However, on cross-examination, he explained that he reviewed dust reports for the mine and found that it had received two citations on the same MMU during a four month period beginning in 2008. Hayes viewed the "trigger samples" taken on the coal haulers that indicated overexposure to respirable dust. (Tr. 209-211).[1]

Elliot Polston was the section foreman at the mine at the time the violation was issued. He saw nothing in the notes or reports on the day of the overexposures that would have led him

[1]I note here that, while the mine had two prior violations and a number of trigger samples out of compliance, the Secretary did not adequately explain the trigger samples and their significance.

to believe there was a dust issue. Polston testified that it is an ongoing process throughout the day to keep ventilation in place, keep the roads watered, and make sure that miners stand behind line curtains in order to minimize dust exposure. He was in charge of, for the most part, collecting the samples that were out of compliance, but he has no explanation for the over exposure. It is his belief that the mine was complying with the ventilation plan on the day the samples were taken. In his view, the manner in which the samples were weighted caused the inaccurate results. (Tr. 238-244).

Jeff Buskirk is presently, and was at the time of the violation, a lead man at the mine. He reviewed the mine's documents, including the preshift and onshift records, and could not identify anything that would lead him to believe that there were elevated dust levels that day. Although Buskirk was lead through his testimony, it appears that, in his view, the amount of air was adequate and the ventilation was working as required by the plan. (Tr. 249-250).

David Wininger is currently retired but worked at Air Quality for nine years as a safety technician. He was certified "to run dust pumps" and was in charge of the dust program. He reviewed the samples. Wininger stated that he does not see any pattern of violation in the MMU 4 and the mine "hadn't had a citation for awhile." He opined that an issue with dust on one unit does not necessarily indicate a problem with the other continuous miner since the equipment operates on separate splits of air. At one time, 19 months prior to this violation, the mine did have some single samples that were over the 2.0 limit. (Tr. 267). After reviewing a dust sampling result report for the mine, Wininger agreed that there were a number of samples over the 2.0 limit but, in his view, those samples would not put the mine on notice that they had any unusual problem with repsirable dust. *See* BB Ex. TT. Wininger believes that many things can happen to elevate the dust sample over the limit. In his opinion, the violations were not consistent and did not demonstrate a pattern. I give little credit to Mr. Wininger's testimony as his answers were limited to a few words except on cross-examination.

I find Hayes to be a credible and knowledgeable witness with a good basis for his opinion regarding the overexposure to dust. However, I can't agree that the Secretary has proven by a preponderance of the evidence that the negligence was any more than moderate. The mine has offered some mitigating, albeit confusing, evidence regarding the negligence. Therefore, I find the negligence to be moderate and based upon the statutory penalty criteria, assess a penalty of $20,000.

2. *Order No. 8415738*

On April 20, 2009, Inspector Anthony DiLorenzo issued order number 8415738 to Black Beauty for a violation of 30 C.F.R. § 363(a) of the Secretary's regulations. The citation alleges the following:

> Hazardous conditions found during the onshift of the 1 "B" belt have been carried in the book, maintained at the mine surface,

> since the 4/14/2009 day shift. The hazards are preventing the examiner from making a complete examination from crosscuts #51-#52 and #61-#62. The areas are not safe for travel due to the excessive water, obstructions in the passageway and slip/trip/fall hazards. No effort has been made to correct these hazards. The conditions are obvious, extensive and have existed for a significant amount of time. This violation is an unwarrantable failure to comply with a mandatory standard.

DeLorenzo initially found that the violation was non-S&S and that an injury or illness was unlikely, but that any injury could reasonably be expected to result in lost workdays or restricted duty. He later modified the citation to reflect that it was S&S and that an injury or illness was reasonably likely. In addition, he found that 1 person would be affected by the condition and that the violation was the result of the respondent's high negligence and unwarrantable failure to comply with the mandatory standard. The Secretary has proposed a penalty of $4,000.

a. **The Violation**

DiLorenzo issued the order for a violation of section 75.363(a) which requires, in pertinent part, the following:

> Any hazardous condition found by the mine foreman or equivalent mine official, assistant mine foreman or equivalent mine official, or other certified persons designated by the operator for the purposes of conducting examinations under this subpart D, shall be posted with a conspicuous danger sign where anyone entering the areas would pass. A hazardous condition shall be corrected immediately or the area shall remain posted until the hazardous condition is corrected

30 C.F.R. § 75.363(a). The dictionary defines hazard as "a source of danger." *Webster's New Collegiate Dictionary* (1979) at 522. In the context of this analysis, the danger associated with a hazardous condition is damage to, or accidents involving, miners.

DiLorenzo issued this order after observing a number of hazards, primarily large pools of water, along the 1 B belt that had been listed in the examination books of the mine for several days. (Tr. 856-857). In his view, the areas referenced in the order were not safe to travel and no effort has been made to correct the hazards. The hazards were the subject of a separate violation, and were issued primarily for water, mud, and debris in the walkway along the belt. (Tr. 858-859). He explained that, while no one was traveling through the area while he was present, the belt examiner was required to travel the area at least once on each production shift. (Tr. 858).

The examination books indicated that there was "work in progress" but DiLorenzo saw no pumps or pump lines, no warning signs, and no other evidence of work being done at that time to correct the conditions. He did see a make-shift dam that proved to be inadequate, but he could not discern any other measures in place to alleviate the water problem. (Tr. 859-860).

Horst, an hourly employee at Air Quality, accompanied DiLorenzo on the inspection. Horst has worked in the mining industry for over eight years. He recalled that, as he walked the 1 B belt with DiLorenzo, there was water in the walkway but it did not go over the top of his boots. He estimated that the water was around 13 inches deep. Horst agreed that the water was rib to rib, but stated that the water was clear and he was not concerned about falling as he walked through it. The examiner would not be prohibited from making his examinations with this amount of water. Horst would not describe the condition as creating a hazard. DiLorenzo, on the other hand, determined that, given the water was 13 inches deep, murky, and covered up an uneven bottom of rock and coal, there was a hazard. (Tr. 842-843).

In order to establish a violation, the Secretary must first demonstrate that "hazardous conditions" existed. Next, she must establish that the hazard had not been corrected or posted. Hence, the Secretary has the burden of demonstrating that the conditions listed by DiLorenzo are a hazard, that they can cause damage or accidents. Once the existence of a hazard has been established, the focus shifts to the actions, if any, taken to remediate the condition. In his testimony, DeLorenzo refers to the hazardous conditions he cited in citation number 8415735, discussed below, for an alleged failure to keep a clear 24 inch walkway on either side of the beltway. I rely on the description of that hazard here. The safeguard that is the subject of that violation requires that the travelway be kept free from water and mud such that a clear 24 inch width of travelway is provided along the belt. The safeguard must, and in this case does, address the hazard associated with walking in water along the beltway. While there is some disagreement about the condition of the water, I credit DiLorenzo's testimony that it was dark, murky, difficult to see through, and contained rocks and debris. Given that the water was undeniably 13 inches deep, and the bottom could not be seen, the Secretary has demonstrated that the water in the walkway was a hazard. As a result, the condition was a hazard and should been immediately corrected or posted. The evidence establishes that the condition was neither posted nor corrected. I find that the violation has occurred.

b. **Significant and Substantial**

DiLorenzo initially marked this violation as "unlikely" and, therefore, not S&S. He later modified the citation to "reasonably likely" and S&S. However, DiLorenzo's testimony about the S&S nature of the violation was limited. In response to one question about why this was S&S, DiLorenzo essentially restated certain elements of the S&S analysis. (Tr. 867-868). There was no further explanation or elaboration. I have already found a violation, and that a hazard existed, but the third element of the *Mathies* test has not been sufficiently addressed and, therefore, the Secretary has not shown that the violation is S&S.

c. **Unwarrantable Failure**

The mud and water obstructing the walkway was obvious and extensive. As far as DiLorenzo could see, little if any effort was made to correct the condition even though it had been noted by the examiner for six days, on each production shift. The 1 B belt line was taken out of service to terminate the violation and it took about five hours to adequately pump out the water. (Tr. 863-865). DiLorenzo explained that, given the amount of time he spent in the belt area, he would have noticed corrective efforts. However, there were no corrective measures being taken. DiLorenzo testified that management was on notice that there continued to be water and mud in the walkway since the condition had first been entered in the record of examination six days prior. Despite that knowledge, the condition was not corrected. At times, the examination book contained a notation that work was in progress to correct the condition. However, since the condition existed for an extended period of time and there was nothing noticeable being done, DiLorenzo felt it was inexcusable. He explained that "there was no corrective action taken to correct that condition. The - it's been carried in the record books for approximately six days. A mine management and officials have countersigned the belt examining record books acknowledging that they have read and understand what they have entered." (Tr. 861).

Eric Carter, an assistant mine manager for Air Quality, oversees all outby activities and has 17 years mining experience. He assisted in terminating the order by getting tools and pumping the water. He testified that the water at crosscut 62 was only a small amount, but agrees that the water near crosscut 50 had been coming through the walls and was more extensive. Nevertheless, Carter believes that the amount of water at both locations did not amount to a hazard. When he arrived at the belt walkway on the day the order was issued, the miners were mucking the water with buckets. He brought a pump to use at crosscut 62. After the water had been mostly pumped out, rock dust was put down to dry the area. He does not believe that the condition prevented an examination. After the belt was shut down, he saw that the bottom belt spray was stuck and was causing water to leak and accumulate. In addition, he testified that washing equipment nearby had caused water to seep through the walls. He stated that he discovered the notes in the examination books about the water and, as a result, had contractors shoveling and rock dusting the walkway. Reports provided by the operator for 4/15/09 indicate work in progress on water in 1 B belt. The same is true on 4/16/09.

A few days prior to the citation, Carter had been told by an examiner that water was unexpectedly coming into the belt-way. As a result, Carter sent workers to shovel and rock dust. However, there is no evidence that any pumps were used until after the citation was issued. Once the pumps were brought in, and the belt shut down, a leak was found and repaired, and the water was removed. The mine has no explanation as to why the search for the cause and the use of pumps were not initiated until after a citation was issued. They had not done enough to correct the water problem over a lengthy period of time. I credit the testimony of DiLorenzo and characterize the Respondent's behavior as "indifference" or "serious lack of reasonable care." Therefore, I find that the negligence is high and that the violation was a result of an

unwarrantable failure to comply. I assess a $4,000 penalty.

3. *Order No. 7522964*

Inspector Donald Roby issued order number 7522964 on April 27, 2009, citing a violation of section 75.370(a)(1) for a failure to follow the mine's ventilation plan. The order alleges that "[t]he respirable dust portion, (requiring the scrubber screen to be cleaned after each cut) of the ventilation plan approved 05-27-2007 is not followed on the 003-MMU, in that; the scrubber screen is not cleaned prior to the beginning a second cut." Roby determined that a permanently disabling injury was reasonably like to occur, that the violation was significant and substantial, and that one person would be affected. Further, he found that the violation was the result of the operator's high negligence and unwarrantable failure to comply. A penalty of $9,882 is proposed.

a. **The Violation**

Inspector Don Roby, a health specialist with MSHA, has 21 years mining experience. Prior to working for MSHA he held many positions, including mine foreman, and mine superintendent. Roby was at the Air Quality mine on April 27, 2009 as a part of the "dust busters" team. The team is a group organized by MSHA to target mines with respirable dust issues and assist those mines in eliminating the problems. The subject violation occurred on the 003-MMU, the working section where Roby was observing the continuous miner operator. (Tr. 276). After taking a cut, which consists of 4 lifts, the miner operator failed to clean the scrubber as required by the mine's ventilation plan. The mine's plan defines a cut, by way of a diagram, as four lifts of 20 feet deep by 10 feet wide, for a total cut size of 40 feet deep by 20 feet wide. Sec'y Ex. 33 p. 25; (Tr. 281). The scrubber screen is a mesh of wire that is layered, encased in a rubber frame, and inserted into the continuous miner. The screen collects particles of dust so that the particles are prevented from being liberated into the air. The intent of the screen is to cut down on exposure to respirable dust. (Tr. 280).

On the day of the violation, Roby was watching the miner while it was cutting a crosscut from the 4 entry to the 5 entry. The machine must make two runs to make the 20 feet wide cut, and 4 runs to make the 40 feet deep cut. Roby observed the operator check the scrubber and sprays, cut 4 lifts, and then stop and check the scrubber. He then watched lift 1 and 2 of the next cut. When the operator turned the scrubber on to take lift number three, Roby issued the order for not cleaning the scrubber screen.

Mark Bedwell II, a lead man and former section foreman, testified on behalf of Air Quality. Bedwell was in charge on the day the citation was issued, and deferred to the inspector as the work progressed. He remembers the sequence differently than Roby, but states that he asked Roby if he should clean the screen and was told he was not required to do so. Bedwell's testimony is unclear. On one hand, his understanding of "one cut" is different than Roby's. At the same time he knew the meaning of a cut as evidenced by the fact that, shortly before the

citation was issued, he asked the inspector if the screen needed to be cleaned. (Tr. 315-317). I do not find Bedwell to be a credible witness.

The evidence supports the finding that the miner operator did not clean the screen after the full cut, as was required by the plan. There was some discussion by the operator about how many lifts must be completed in order to constitute a full cut for purposes of the ventilation plan. I find that the plan speaks for itself and the cut was made without the screen being cleaned. The violation is proven.

b. **Significant and Substantial**

The Secretary contends that, since the scrubber screen was not cleaned, the operator of the machine was exposed to respirable dust. Roby testified that the miner operator was exposed to "an undue amount of respirable dust" because the screen would have been clogged with coal dust from the previous cut, thereby diminishing its effectiveness. (Tr. 288-289). While there is no question that exposure to respirable dust is serious and will result in black lung or other debilitating diseases, there is no evidence in the record to demonstrate that the miner operator was exposed to any amount of dust. Roby assumed that he was exposed for the short period of time but provided no further information regarding the exposure. Roby stated that, while he tested the effectiveness of the screen prior to this cut, it did not fall below the requirements in the ventilation plan. (Tr. 289). There is little evidence presented by the Secretary to demonstrate that the miner operator was exposed to dust, and no evidence that he was overexposed.

The Secretary has the burden of proving all elements of the *Mathies* test. While in dust cases there may be a presumption applicable in examining the third prong of that test, the Secretary has not even proven that a hazard existed as a result of the violation. Further, I am not convinced that the scrubber would have remained in operation without the proper cleaning for any length of time. The scrubber screen was working and was collecting dust, even though, after the first cut, it had diminished effect. There is no evidence that the diminished effect exposed anyone to any amount of respirable dust. Without more, I cannot find that the failure to clean the scrubber, resulted in a hazard. Therefore, I find that the violation is not S&S.

c. **Unwarrantable Failure**

The Secretary presented little evidence to substantiate a finding of unwarrantable failure. There was no evidence that the action of the foreman in not cleaning the scrubber was aggravated conduct or intentional. Indeed, with the inspector watching, it is fair to assume that the mine operator would strictly adhere to its ventilation plan and follow the course it believed to be correct. In addition, the Secretary has not sufficiently demonstrated the existence of any aggravating factors. The violation cannot said to be extensive, to pose a high degree of danger, or that the operator had knowledge of the violation. Again, it is not clear from Bedwell's testimony why he failed to clean the scrubber. Nevertheless, there is no evidence adduced by the Secretary to show that he or other management demonstrated aggravated conduct. Therefore, I

find that the violation is not unwarrantable and that the negligence is moderate. I assess a $5,000 penalty.

4. *Order 8415756*

On April 30, 2009, Inspector DiLorenzo issued citation number 8415756 to Black Beauty for a violation of section of the Secretary's regulations.[2] The citation alleges that:

> An adequate examination has not been performed on the 5 "C" belt conveyor drive. Upon activation of the fire suppression system, no alarm was given to all locations where miners would be endangered by a belt fire or at a manned location where the posted person has telephone or equivalent communications with all persons who may be endangered. A record of any examination could not be found at or near the belt drive or at any location on the surface. Wires inside the control panel had to be switched with different channels and reconfiguration with the computer system had to be made for the system to become operable. This belt drive has been in service since 04/15/2009. This violation is an unwarrantable failure to comply with a mandatory standard.

The inspector found that a fatal injury was reasonably likely to occur, that the violation was significant and substantial, that two persons would be affected, and that the violation was the result of the Respondent's high negligence and unwarrantable failure to comply. The Secretary has proposed a civil penalty in the amount of $12,563.

a. **The Violation**

Inspector DiLorenzo testified that, while conducting an inspection of the Air Quality mine on April 30, 2009, he tested the fire suppression system. During the test of the system, he asked to see the examination book, but it could not be found. The standard requires that the sprinkler system be examined weekly. DiLorenzo testified that an examination of the system includes an examination of the piping and sprinkler heads, making sure that the sprinklers are pointed the right direction and that spacing is correct, and that the alarms and warnings are in working condition. (Tr. 935). The examination book, which is used to document these weekly examinations, is normally kept at the belt drive. (Tr. 936). Initially a book could not be found underground, but DiLorenzo testified that the mine eventually produced something that appeared to be a log book used at the surface to record tests of the system. DiLorenzo had no reason to question the authenticity of the book (Tr. 939).

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[2]DiLorenzo initially cited a violation of 75.1103-8 but prior to hearing amended the citation to show a violation of 75.1101-11.

DiLorenzo learned that the belt drive was installed on April 15, and the alarm system was also installed and in service at that time. However, when tested by DiLorenzo two weeks later, the fire suppression system was not functional, as it failed to send an audible alarm to the surface. After being at the mine for a number of hours, a log book was produced, but, in DiLorenzo's estimation, it did not indicate that any tests of the alarm systems had been conducted as required (Tr. 939).

Dustin Galloway is an hourly employee at the mine and has ten years of coal mining experience. He accompanied DiLorenzo to the 5 B belt drive. While Galloway watched, DiLorenzo tested the fire suppression system. According to Galloway, a visual warning, flashed and the belt shut down when it was tested. (Tr. 963-965). Galloway agreed that the audible alarm on the surface didn't sound and, as a result, the maintenance foreman was called. Galloway acknowledged that DiLorenzo asked to view the exam book for the fire suppression system, but it couldn't be located. According to Galloway, the examination book is kept at the drive and at the surface in the maintenance planner's office, yet it could not be found at the time of the inspection. (Tr. 966-967).

Mark Bedwell, the shift maintenance foreman, conducted the trouble shooting when the alarm failed to activate. He determined that the flow to the box was good and then began to examine the electrical box where he found that a neutral wire had been pulled out of the channel in the box. He repaired the problem by reattaching the wire. (Tr. 978). He agreed with DiLorezo that it took a little time to find the problem, but he disagrees that he had to reconfigure the box in order to make the visible alarm operational.

Additional witnesses for the operator testified that the examination was done weekly, as required by the regulation, and that the results of the tests of the fire suppression system are kept in the computer and in a book on the surface, as well as in an examination book kept underground. Eventually, all books were found and presented to the Secretary. One witness, Kenneth Shuts, knew the mine was looking for the examination books and observed that the books had recently been placed in protective covers and moved from the starter box to the top of the box. (Tr. 990). Shuts told DiLorenzo that the system had been operational since the belt move, but DiLorenzo would not discuss it. (Tr. 992). However, after DiLorenzo mentioned that he thought the system had not functioned for some time, Shuts pulled the data base logs and satisfied himself that the system was activated and operated as it should. *See* BB Ex. R-KKK; (Tr. 993-995). In order to demonstrate the functionality of the warning system, and to show that the weekly examinations had been conducted on the belt fire suppression system, there are a number of records of the system kept both underground and in the office at the surface.

The Secretary has not provided enough evidence to support the violation as alleged. The fact that the book was missing, and missing for the remainder of the shift, along with the fact that the system did not operate at the time it was tested, is not enough to support a finding that the weekly examination was not conducted. The Secretary does not indicate when the last examination was made. Instead, because the book could not be found, she assumes that the last

examination was two weeks prior when the system was put in place. There is little evidence about the examination book, what was reviewed, and what it demonstrated once it was discovered. The Secretary did not establish that the weekly examination had not been conducted or, if it had been, that it was inadequate. The witnesses for Air Quality indicated that the examination was conducted weekly, that all aspects of the system were tested, and that the condition cited by DiLorenzo would have been discovered during the next weekly examination.

The Mine Act imposes upon the Secretary the burden of proving each alleged violation by a preponderance of the credible evidence. *In re: Contests of Respirable Dust Sample Alteration Citations*, 17 FMSHRC 1819, 1878 (Nov. 1995), *aff'd sub nom. Sec'y of Labor v. Keystone Coal Mining Corp.*, 151 F.3d 1096 (D.C. Cir. 1998) (quoting *Garden Creek Pocahontas Co.*, 11 FMSHRC 2148, 2152 (Nov. 1989)). The preponderance standard, in general, means proof that something is more likely than not. *Id.* at 1838. There is not enough evidence presented by the Secretary to meet the burden of proof. Therefore, the citation is vacated.

C. Docket No. LAKE 2009-570

This docket contains sixty-three (63) violations with a total proposed penalty of $262,994. The parties have resolved a number of the violations, leaving eleven for decision here.

1. *Citation No. 8415735*

On April 20, 2009, Inspector Anthony DiLorenzo issued citation number 8415735 to Black Beauty for a violation of section 75.1403-5(g), based upon an earlier notice to provide safeguard. The citation alleges that:

> A clear travelway at least 24 inches wide was not being provided on both sides of the energized 1 "B" conveyor belt. Water, mud, rock and coal was observed at crosscut #62 in the beltline up to 13 inches in depth, 17.5 feet in width and up to 30 feet in length. At crosscut #51-#52 no clear walkway was provided in the beltline due to rock, coal, curtain and water measuring up to 9 inches in depth, 16 feet wide and up to 20 feet in length.

The inspector initially found that an injury was unlikely to occur, but that any injury could reasonably be expected to result in lost workdays or restricted duty. Further, he found that one person would be affected, and that the violation was non-S&S and result of moderate negligence. He subsequently modified the order to reflect that and injury was reasonably likely and that the violation was S&S and the result of high negligence. The Secretary has proposed a civil penalty in the amount of $3,405.

a. **The Violation**

Inspector DiLorenzo testified that he has been an authorized representative of the Secretary since 2008. He is currently, and has been, the supervisor at Vincennes since the summer of 2010. He worked in mines during his senior year of high school in 2003, and through college, where he earned a degree in safety management. He conducted mine examinations and worked as a lead man while working in the mines. (Tr. 839-840).

On May 11, 2009, DiLorenzo walked the beltway at the 1 B conveyor while he conducted an inspection of the Air Quality mine. He observed sufficient water in the travelway to hinder walking. According to DiLorenzo, the water limited the travel area to less than 24 inches, thereby violating a safeguard that had been issued to the mine in 2003, Sec'y Ex. 45, and modified in 2007, Sec'y Ex. 46. The water was dark and murky as a result of the rock, coal and debris on the bottom, thereby making it difficult to see the mine floor. (Tr. 841-843). Absent the water and mud, the travelway was the 24 inches required by the safeguard. (Tr. 844-845). The safeguard specifically requires that "a clear travelway at least 24 inches wide be provided on both sides of all belt conveyors." The modification of the safeguard adds that the travelway "shall be clear of mud and water." (Tr. 845).

DiLorenzo observed the water and mud at two separate areas along the belt; first, near crosscut 51-52 and, second, near crosscut 62. (Tr. 849). In each area, the water and mud hindered the ability to travel along the belt and prevented the existence of a clear 24 inches of travelway. The rock and coal in the water, along with the water itself, created a slip, trip, and fall hazard The water depth of 13 inches reached to the middle of DiLorenzo's calf. (Tr. 874).

While the mine does not dispute that the travelway contained water, thereby limiting the access to less than 24 inches, the mine does dispute that the water created a hazard. Damian Horst, a utility worker for the mine who accompanied DiLorezo, testified that there was water covering the walkway, but the mine examiner had continued to conduct his examinations. It was Horst's belief that the water was not deep enough and that the bottom could be seen, thereby eliminating any hazard. However, Horst agreed that he would have listed the condition in the belt examination book as a hazard. (Tr. 885-886).

Rick Carter, the mine manager, abated the citation after observing the condition. He believed that there was "a small amount if (sic) water at 61/62 [crosscut] and then . . . from that area down to the 50's where the water had been coming through the walls." (Tr. 895). When Carter arrived, miners were mucking water at one location. Carter used a pump at the other location to remove the water, and then rock dust was put down to dry all the areas. (Tr. 895-896). After the belt was shut down, he saw that the bottom belt spray was stuck and was causing water to leak and accumulate in the area. Carter testified that he was also aware that washing equipment nearby had caused water to seep through the walls. (Tr. 897). While Carter testified that he discovered the notes in the examination books about the water and had people working in the wet areas, shoveling and rock dusting the walkway, I note that his testimony was not specific about when the work was done. Carter reviewed the mine reports and explained that on 4/15/09 the examination book indicated work on water in 1 B belt. The same is true on

4/16/09. (Tr. 900). At some point prior to the citation being issued, Carter had been told by an examiner that water was coming into the beltway, but he didn't know where. Carter responded by getting involved and sending workers to shovel and rock dust. However, there is no evidence that any pumps were used until after the citations was issued. It took just one pump about ten to 20 minutes to pump out the water at 62 crosscut once the citation was issued. (Tr. 912). I do not find Carter to be a credible witness.

The mine has raised the issue of the validity of the safeguard itself. Prior to hearing, the mine filed a motion to dismiss citation numbers 8415735, 8415371, 8415372, and 8415373, which are all based on the safeguard at issue. (See Black Beauty Mot. to Dismiss). Black Beauty alleges that the notice to provide safeguard and subsequent modifications are invalid and, therefore, the citations issued for violations of such should be vacated. Black Beauty makes two arguments in support of its motion. First, Black Beauty argues that the notice to provide safeguard as originally issued, and the second modification of that safeguard, do not specifically identify a hazard. Second, Black Beauty argues that the second modification of the notice to provide safeguard does not provide any "indication that it was based on specific conditions that actually existed at the mine." *Id.* at 6.

The Secretary argues that the notice to provide safeguard, as originally issued, identifies with necessary specificity the hazard of "'rib coal and rib rock' blocking the travelway." Sec'y Resp. to Mot. to Dismiss 3. Moreover, the second modification of the notice to provide safeguard identifies with necessary specificity the hazard of "'mud and water' in the travelways." *Id* at 4. A reading of the safeguard makes it clear that a 24 inch clear travelway on each side of the belt is required and that to have it otherwise would create a walking hazard along the belt.

Section 314(b) of the Mine Act grants the Secretary authority to issue "[o]ther safeguards adequate, in the judgment of an authorized representative of the Secretary, to minimize hazards with respect to transportation of men and materials." 30 U.S.C. § 874(b). A representative of the Secretary, generally an inspector, may issue a notice to provide safeguard only after "determin[ing] that there exists . . . an actual transportation hazard that is not covered by a mandatory standard." *Southern Ohio Coal Co.*, 14 FMSHRC 1, 8 (Jan. 1992). The Commission has held that, because a notice to provide safeguard is issued by an inspector and is not subject to the notice and comment procedural protections of section 101, the language of a notice to provide safeguard "must be narrowly construed" and is "bounded by a rule of interpretation more restrained than that accorded promulgated standards." *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (Apr. 1985). In recognition of such, and in order to provide proper due process, a notice to provide safeguard "must identify with specificity the nature of the hazard at which it is directed and the conduct required of the operator to remedy such hazard." *See id.*; *see also Cyrus Cumberland Resources Corp.*, 19 FMSHRC 1781, 1784-1785 (Nov. 1997).

On February 4, 2011 I issued an order denying the mine's motion to dismiss in which I noted I agree that, in order for a safeguard to be validly issued, it must be based on specific conditions that actually existed at the mine. In *Southern Ohio Coal Co.*, the Commission stated

that "[t]he Secretary is required to demonstrate only that the inspector evaluated the specific conditions at the particular mine and determined that a safeguard was warranted in order to address a transportation hazard." 14 FMSHRC 1, 14 (Jan. 1992). The Secretary has the burden of establishing the validity of a safeguard.

At hearing, the Secretary was required to establish that the second modification of the notice to provide safeguard was issued based upon specific conditions that actually existed at the mine. To that end, the Secretary called Kenny Benedict who was present when the modification to the safeguard was issued in August, 2007. Benedict recalled mud and water in the travelway and along the belt, that was deep enough that he avoided walking through it. (Tr. 592). The Secretary also introduced the field notes of the issuing inspector, Sec'y Ex. 72, and Benedict testified that the safeguard and notes were written as a result of finding water and mud in the travelway, thereby making it difficult, if not impossible, to walk along the belt. (Tr. 603). The safeguard, as originally issued, requires at least 24 inches on each side of the conveyor. The modification also requires 24 inches and adds that the travelway be clear of water and mud. The general hazard identified by the safeguard and modification is obvious, that of water and mud obstructing the use of the 24 inch travelway. A miner should be able to travel along the belt without fear of slipping and falling. Given the nature of safeguards, and this particular safeguard, the face of the notice need not be as detailed and specific as Black Beauty would require. This safeguard requires a 24 inch travelway, and specifically requires that the 24 inch travelway be free of water and mud. I find that the Secretary has demonstrated the inspector evaluated the conditions at the mine and determined that the safeguard was warranted. I further find, as I did in my previous order, that this safeguard identifies with specificity the hazard at which it is directed and what is required to abate the violation of such safeguard.

The Secretary has met her burden of establishing the validity of the safeguard. DiLorenzo testified, without dispute, that there was water to a depth of 13 inches. I find that a clear 24 inch travelway along the belt was not provided. Accordingly, I find that a violation has been established.

b. **Significant and Substantial**

I have found that there is a violation of the mandatory safety standard. Second, I find that a discrete safety hazard existed as a result of the violation; mud, water, rock and coal preventing safe travel along the belt line. DiLorenzo observed the water and mud at two distinct areas along the belt. The conditions hindered the ability to travel and did not provide the required 24 inches of travelway. The water contained rock and coal, making it murky and even more of a travel hazard according to DiLorenzo. (Tr. 847-850). According to DiLorenzo, any fall would result in lost workdays or restricted duty due to injuries such as broken bones, strained ankles or knees, or head injuries. He determined that only one miner would be exposed. (Tr. 848). Witnesses for the mine credibly testified that they disagreed with DiLorenzo and asserted that the water was not as deep or as murky as he described.

Air Quality argues that a violation of a safeguard may not be designated as S&S because it does not qualify as a violation of a mandatory standard. According to the Respondent, even if the violation meets the *Mathies* test for S&S, the Secretary is prohibited from designated it as such. The Commission has disagreed with the mine's argument and, instead, has determined that a violation of a safeguard is a violation of a mandatory safety standard and, therefore, can constitute a S&S violation. *Wolf Run Mining Company*, 32 FMSRHC 1228, 1236 (Oct. 2010). In spite of such, in this case the Secretary has not met her burden of establishing that the violation was S&S. There is a dispute as to the condition of the water and exactly what 13 inches means, i.e., over the shoes or up to the calf, and a dispute about whether the bottom could be seen while wading through the water. DiLorenzo briefly mentioned that he has seen people fall in water, but he did not establish what the result of falling in this particular part of the mine would mean. Hence, while I believe that the water created a hazard to those walking in it, I find that the Secretary has not shown that this particular violation is reasonably likely to lead to an injury-causing event. In light of the foregoing analysis, I find that the Secretary has not met her burden of proving that the violation was S&S.

c. **Negligence**

DiLorenzo reviewed the examination books when he returned to the surface and found an entry for April 20th that mentions "crosscut 61 to 62 excessive water intake walkway." Sec'y Ex. 30; (Tr. 854). As far back as April 14th, the examination book shows a notation for water along the 1 B beltway. DiLorenzo reviewed 11 or 12 exams that mentioned water in the 1 B beltway. Some of those exams contained a notation that work was in progress. DiLorenzo explained that the work in progress was not enough, as the water remained and continued to be noted in the examination records.

DiLorenzo estimates that the mine had ample time to correct the problem. While Carter testified that he sent some workers to shovel and put down rock dust, it wasn't clear when this occurred or how often he did so. It is undisputed that he did not resort to a pump until after the citation was issued, nor did he take the time to discover the source of the water until that time. Taken as a whole, the testimony demonstrates that the mine did not take the issue seriously and made little, if any, effort to correct a hazard that had been listed in the examination books for nearly a week. The mine was indifferent, at best. I find that the violation was the result of high negligence. I assess a penalty of $2,500.

2. *Citation No. 8415779*

On May11, 2009 Inspector Anthony DiLorenzo issued a citation for a violation of the ventilation plan, and cited to 30 C.F.R. § 75.370(a)(1). The violation alleges that "[t]he approved ventilation plan was not being complied with on MMU 005 on the Co. #19 Stamler feeder located in the #4 entry between crosscuts #8-#9 on the 5 'C'. The energized feeder did not have any functioning water sprays while mining. The water to the feeder was shut off." The inspector found that the violation was reasonably likely to result in a permanently disabling injury, that

three persons would be affected, that the violation was S&S, and that it was the result of the operator's high negligence. A penalty of $9,634 has been proposed.

a. **The Violation**

DiLorenzo arrived at the Air Quality mine on May 11, 2009, to conduct a spot inspection, primarily of the ventilation system. He traveled to the MMU 005 where he observed the No. 19 feeder in operation and found that the water sprays were not functioning. According to DiLorenzo, this condition was a violation of the mine's approved ventilation plan. (Tr. 1019-1020). After further investigation, he found that the water valve supplying water to the feeder was turned off. The ventilation plan requires that a minimum number of water sprays must be maintained operational at belt transfer points, one at each transfer point, and loading points such as the one at the ratio feeder. Sec'y Ex. 33 p. 9 ¶ 2(a); (Tr. 1021-1022). The inspector testified that the feeder must have at least one spray, which I take to mean that the one spray should be turned on, or operational, during coal production. (Tr. 1022). The lack of working sprays created a large, visible cloud of dust for one and a half crosscuts. (Tr. 1021). The mine does not dispute that the water valve to the sprays was turned off or that there is a violation of the ventilation plan. Hence I find that there is a violation as alleged.

b. **Significant and Substantial**

I have determined that there is a violation of a mandatory standard and I agree with the Secretary that the lack of water sprays, as required by the ventilation plan, allows respirable dust to enter into the atmosphere where miners are working, thereby, creating the hazard of overexposure to respirable dust. Over time, the exposure to dust causes lung disease, specifically black lung. Three operators of the coal hauling equipment who traveled in the area were exposed to the respirable dust. The coal haulers continuously rotate between moving to the feeder, dumping, and then returning. DiLorenzo surmised that, since he could see a thick cloud of dust for one and a half crosscuts, there were quantities of respirable dust in the air. (Tr. 1025). The feeder was breaking down the coal, thereby creating dust that was not controlled or suppressed as it should have been by operational water sprays. (Tr. 1023). DiLorenzo opines that the exposure to the dust in the air is likely to lead to a serious injury. (Tr. 1027).

Hayes, an MSHA health specialist, testified that an MSHA group known as the dust busters were assigned to the mine due to the dust issues. Although they had some problems getting enough valid air samples, a number of the results showed that the mine atmosphere exceeded the standard for respirable dust. Sec'y Ex. 59. The coal haulers are exposed to dust when in the area where coal is dumped onto the belt, such as the area near the feeder cited here, as well as other areas. Hayes explained that the only control of the dust is the spray at the feeder. Hayes agreed that the violation is S&S and that any exposure, even a short exposure, will cause harm to the miner. Hayes understands that one of the persons wearing a dust monitor in the area registered the dust concentration at 1.94. He stated that, even though that concentration does not exceed the concentration allowed by the regulations, it is very close. Given that close reading,

Hayes believes it has the potential, like any overexposure, to lead to black lung.

Cameron McCallister, a foreman at the mine on MMU-05 on May 11, testified that he was called to the feeder to speak with the mine inspector. He saw no visible problem with respirable dust and noted no ventilation problems in the report of examinations that he reviewed. (Tr. 1070-1071). McCallister explained that, given the location of this feeder, the sprays cannot be seen when standing in certain areas and, accordingly, he believes that no one saw that the sprays were not operating that day. McCallister agrees that the valve was turned off and no sprays were operating, but cannot explain why. He did suggest that the sprays do not operate continuously and, rather, only when coal is in the shoot. (Tr. 1072). He disagrees that the miners were exposed for the entire shift since his records indicate that mine production did not begin until about 9:40 a.m. on that day, just one hour before the citation was issued.

While the mine operator argues that miners were not exposed to dust for any length of time, and that the only reading available showed an exposure concentration below the 2.0 ceiling, I find that, over that time period, there remains sufficient evidence of a hazard. The Commission has held that the overexposure to coal and quartz dust resulting from a violation of the respirable dust standards, i.e., 30 C.F.R. §§ 70.100 or 70.101, is presumed to be S&S. *U.S. Steel Mining Co., Inc.*, 8 FMSHRC 1274, 1281 (Sept. 1986); *Consolidation Coal Co.*, 8 FMSHRC 890, 899 (June 1986). The Commissioners reached this conclusion based on "the nature of the health hazards at issue, the potentially devastating consequences to affected miners, and the strong concern expressed by Congress for the elimination of occupation-related respiratory illnesses to miners." *U.S. Steel*, 8 FMSHRC at 1281. While there can be no such presumption in this case, since a respirable dust standard is not involved, the same concerns still apply. This is particularly true here, where the exposure was extensive and could have lasted at a minimum of one hour. Therefore, I find that because of the visible dust in the air, as well as the length of time the violation continued, it was reasonably likely that an injury would result; and that the injury would be serious and potentially result in silicosis and/or pneumoconiosis. Therefore, I conclude that the violation was S&S.

c. **Negligence**

DiLorenzo issued this citation with a designation of high negligence because, in his view, the lack of sprays should have been noted during the preshift examination. DiLorenzo believes that it is reasonable to assume that the feeder was operating without any sprays for the entire shift, which began at 7:00 a.m. and continued until the time he issued the citation three hours later. (Tr. 1026-1027). DiLorenzo surmises that the water was probably turned off when the belt was moved during the previous shift, as it is a general practice to turn off the water during the move. (Tr. 1027). This area of the belt had been examined by the belt examiner at 8:30 a.m., but the exam books showed nothing was noted. In addition, the foreman should have checked during the onshift, yet there is nothing to demonstrate that he had conducted an onshift examination. (Tr. 1028).

McCallister disputes DiLorenzo's assumption that the feeder was operating when the belt examiner walked the area at 8:30 a.m. He credibly explained that, due to problems at the mine, coal was not produced until at least 9:40 a.m. No sprays would be expected to be turned on until coal entered the chute. (Tr. 1074). The citation was terminated by turning the valve on, which took less than a minute to do. (Tr. 1073). McCallister admits that he was in the process of doing his dust parameter checks and had not yet made it to the feeder when DiLorenzo found the violation. He agrees that he is obligated to check the sprays before he begins cutting coal, but he had not done that by 10:45 that day. Although McCallister's testimony, as well as DiLorenzo's, is confusing in this regard, there is not substantial evidence to support that this violation is anything more than ordinary negligence. I assess a penalty of $5,000.

3. *Citation No. 7445937*

Quentin Blair issued this violation on May 7, 2009, for a violation of the mine's ventilation plan. The citations alleges the following:

> The operators approved ventilation plan was not being followed on the 004-0 and 044-0 MMU. The operators approved plan requires a line curtain to be installed in all working places. The installed line curtains were rolled up and nailed to the curtain boards in entries 0 thru 9. Methane was detected during this inspection in entries 0 through 9 ranging from 0.1% to 0.6%. If not corrected this condition will cause a serious accident.

The inspector determined that an injury or illness resulting in lost workdays or restricted duty was reasonably like to occur, that 13 persons were affected, that the violation was S&S, and that it was the result of moderate negligence. A penalty of $5,961 has been proposed.

a. **The Violation**

Quentin Blair is employed by MSHA as a coal mine inspector and electrical specialist. He has 16 years of underground mining experience in various positions, including crew leader, electrician, and others. On May 7, 2009, Blair arrived at the mine around 2:00 a.m., met with the shift foreman, checked the examination books, and then traveled underground. The crew was getting ready for a belt move in the number 4 section when he arrived, and 13 miners were cleaning and doing maintenance in the area. (Tr. 614-615). Blair immediately noticed that the ventilation devices, the check curtain, back up curtain, and line curtains were rolled up and were not serving their intended purpose. He issued a citation for a violation of section 75.370(a) for a failure to follow the approved ventilation plan. The ventilation plan requires that the maximum curtain setback distance during clean up activities shall be 55 feet from the deepest corner of penetration or point of deepest penetration. Sec'y Ex. 33, p. 4, ¶ 6. Blair explained that, when doing the clean up, the curtains have to be in place and extended, and not rolled up. (Tr. 618). The curtains were not directing ventilation in the area as required by the plan and, as a result, a

hazard in the form of methane accumulation was created. Blair took readings with his methane detector and checked nine areas, all with curtains rolled up in the entries, and found from 0.1 to 0.6 percent methane.

Chad Barras, who testified on behalf of the company, stated that he is familiar with the ventilation plan. In his opinion, the rolled up curtains did not violate this particular section of the plan, and the portion referred to by Blair refers to areas that are being cleaned with the continuous miner. (Tr. 658-659). It appears that, in this area, the miners may have been using a battery-powered scoop, not the continuous miner. (Tr. 626). Barras argues that the curtains were in place as required by the plan, and the fact that they were rolled up does not indicate a violation.

Page 2 of the ventilation plan refers directly to the ventilation system and contains seven items related to that system. Sec'y Ex. 33, p. 4. Item number 6 addresses clean-up activities. It reads in its entirety: "The maximum curtain setback distance during clean-up activities shall be 55 feet from the point of deepest penetration. If cutting occurs at the face during the cleanup the curtain must be within 40 feet of the deepest penetration. The scrubber will be on during the cleanup operations." *Id.* Not only is this the only paragraph to address clean-up activities, it has a separate sentence for cleanup using the miner. Therefore, I agree with Blair that the first part of this section applies in this circumstance and that rolling up the curtains renders them ineffective. Therefore, although the curtains may be in the proper location, they are not in place such that they function effectively. The Commission has recognized that, although sections of the regulations do not literally set forth a requirement that the items function effectively, such a requirement is implicit in the standard's language and is consistent with the standard's underlying statutory purpose. *Cumberland Coal,* 28 FMSHRC 545 (Aug. 2006). Thus, I find that a violation has occurred.

b. **Significant and Substantial**

I have found a violation of the ventilation plan, and I find that the lack of effective curtains results in the hazard of methane build up in the area. According to the readings taken by Blair, methane was building as he walked the entries. The critical question then becomes, is there a reasonable likelihood that the hazard will result in an injury. Blair unequivocally stated that there is such a likelihood. First, the mine is on a five day spot inspection, and is therefore considered a gassy mine that liberates high amounts of methane. In the event the curtains remained nailed to the wall, as Blair observed, the methane would continue to build to the explosive range. Second, the buildup of methane creates the likelihood of an explosion when combined with an ignition source in the mine. Here, he described several ignition sources, particularly those created by the electrical equipment. There was electrical equipment in the area and, in Blair's view, it was only a matter of time until there was an explosion. The battery powered scoop cleaning the face was the immediate ignition source, and the other electrical equipment, such as the miner, were also sources of ignition. Although the electrical equipment working in the area is required to be maintained in permissible condition, Blair found

permissibility violations during this same inspection. Finally, the mine has a significant history of accumulation violations and permissibility violations, further leading to the likelihood of an ignition or explosion. Sec'y Exs. 60 and 64. The Secretary has established the third element of the *Mathies* formula that the hazard associated with this violation of the ventilation plan is reasonably likely to lead to an injury-producing event. The fourth element, that the injury be reasonably serious, can be reasonably assumed from the fact that the hazard in this case, the build-up of methane, will result in an explosion with a number of miners working in the area. The best those miners can hope for is a serious injury in such a situation.

Barras, on the other hand, testified that the violation was not S&S because .6 percent is not in the explosive range of methane. (Tr. 660). This practice of rolling curtains is not unusual during clean-up at this mine and is not a hazard. He further explained that before a miner goes into an area, the mine must have 7,000 cfm of air and there must be spot inspections for methane. (Tr. 662). Although this mine is on a spot inspection and methane is liberated while cutting coal, there is little liberation while cleaning up and little chance of accumulation. (Tr. 663). Air Quality methane is found primarily in the return air courses and liberation at face areas is minimal. (Tr. 663).

The Commission and courts have observed that an experienced MSHA inspector's opinion that a violation is S&S is entitled to substantial weight. *Harlan Cumberland Coal Co.*, 20 FMSHRC 1275,1278-79 (Dec. 1998); *Buck Creek Coal, Inc. v. MSHA*, 52 F.3d 133, 135-36 (7th Cir. 1995). Blair, who certainly qualifies as an experienced MSHA inspector, fully explained his reasoning and for the reasons described above, I accept his assessment that the violation was significant and substantial.

c. **Negligence**

Blair initially designated the violation as moderate negligence, but at hearing explained that perhaps the negligence was higher. (Tr. 628). He found that there was a foreman directing the clean up work, and that the foreman told Blair that it is a practice to roll up the curtains when cleaning. In Blair's view, this is a very dangerous practice. Ventilation plans are an important part of the safety and health at any mine. Compliance with the plan is essential to make certain that overexposure to respirable dust is minimized and that methane is diluted and rendered harmless. Every person, and particularly every foreman, must know the parameters of the plan and follow them carefully. I agree with Blair that this is more than moderate negligence and assess a penalty of $10,000.

4. *Citation No. 7445941*

On May 7, 2009, Inspector Blair was conducting a regular inspection of the equipment at the Air Quality mine when he discovered a roof bolter that was not in permissible condition. Blair issued a violation which alleges the following:

> The Fletcher Twin boom Roof Bolter s/n 97037 (co.no.006-012) being operated on the 004-0 and 044-0 MMU was not being maintained in a permissible condition. The following conditions were observed. 1. the rear area light had an opening greater than .005 of an inch. 2. the operators side back area light had an opening greater than .003 of an inch and two bolts missing from the lid. This mine is on a five day spot inspection due to the amount of methane liberated.

The inspector found that the violation was reasonably like to cause an injury or illness that would result in lost workdays or restricted duty, that two persons were affected, that the violation was S&S, and that it was a result of moderate negligence on the part of the operator. A penalty of $1,944 is proposed. (Tr. 629).

a. **The Violation**

Quintin Blair issued this violation after examining the roof bolter and other electric face equipment. He found two parts that were not in permissible condition. Blair cited a violation of 30 C.F.R § 75.503, which requires that all electrical face equipment be maintained in permissible condition. (Tr. 629). Blair checked the electrical parts on the roof bolter and then moved on to check the gaps of each part with the feeler gauge to determine if an excessive gap existed. Blair found that the opening on the rear area light was greater than .005 of an inch, and that the side back area light had an opening greater than .003 of an inch and was missing two bolts from the lid. The regulation requires that there be no gap greater than .002. (Tr. 630). The roof bolter was not being used at the time of the examination, but was available for use and, in Blair's estimation, would have been used immediately upon the beginning of coal production. (Tr. 631). Blair discovered that bolts were missing from the back light, which led him to believe that they were in non-permissible condition for several days. He Explained that the last time the permissible check was required, the bolts would have had to have been loose, in order to work their way completely out by the time he inspected the equipment

The testimony is undisputed that Blair observed an extra wide gap in the rear light, as well as the back area light, that exceeded the standard for permissibility on the roof bolter. Accordingly, I conclude that a violation has been established.

b. **Significant and Substantial**

I have found that there is a violation of a mandatory standard and that violation demonstrates a discrete safety hazard, i.e., exposing an electrical ignition source in the mine atmosphere. The impermissible equipment was found in the same area discussed above, where Blair noted that the methane levels were on the rise due to the lack of ventilation. Third, the hazard created, the exposure of an ignition source, is reasonably likely to lead to an explosion or fire. Fourth, the explosion of fire would lead to a serious injury.

Blair explained that this is a gassy mine that liberates excessive methane. His concern about methane was heightened given the gas readings he took when he wrote the ventilation violation. There were 3 other violations found on unit 4, including an accumulation of coal. Although the earlier accumulation violation had been abated, the condition did exist at the same time the permissibility violation existed. If the mine used the roof bolter while being in non-permissible condition, then it becomes a hazard likely to ignite any methane. Blair testified that, if left unabated, a fire or explosion was reasonably likely due to gas he already detected and the accumulation violation on this bolter that was issued on the same day. (Tr. 632). The testimony of Blair regarding this permissibility violation, coupled with the ventilation violation discussed above, have established that the violation is S&S.

Air Quality asserts that the violation is not S&S because the mine would have tested the face for methane prior to moving the equipment to the face. There is also a methane monitor on the bolter that would have alerted the mine to the presence of methane. (Tr. 664). Further, the ventilation at the face would have diluted any methane and moved it away from the bolter. Essentially, the mine argues that the other mandated safety precautions would negate the likelihood of an explosion or fire. However, the Federal Mine Safety and health Commission, relying on *Buck Creek Coal, Inc*. 52 F.3d 133, 136 (7th Cir. 1995), has rejected arguments that after-the-fact safety systems reduce the likelihood of serious injury. The Seventh Circuit, in upholding the decision of the ALJ regarding the serious nature of the accumulations, determined that the existence of other safety measures to deal with a fire does not mean fires are not a serious safety hazard and, rather, the precautions are in place because of the "significant dangers associated with coal mine fires." *Id.* Here, the same rationale applies to equipment that is not permissible and thereby introduces an ignition source into a gassy mine environment. The other mandatory safety precautions that are in place to protect against a build-up of methane do not detract from the hazard associated with the ignition source. I credit the testimony of Blair and his understanding of S&S. I find the violation to be significant and substantial. Based upon a review of all of the penalty criteria, including the history of permissibility violations, I assess a penalty of $2,000.

5. *Citation No. 8415754*

On April 30, 2009, Inspector Anthony DiLorenzo issued citation number 8415754 to Black Beauty for a violation of 30 C.F.R.§ 75.1103-5(a)(2) of the Secretary's regulations. The citation alleges the following:

> The fire suppression system provided for the 5 "C" belt drive has not been installed to provide an effective warning signal. Upon activation of the system no alarm was given to all location were miners would be endangered by a belt fire or at a manned location where the posted person has telephone or equivalent communication with all persons who may be endangered.

At hearing the Secretary moved and was granted a modification of the citation to a violation of section 75.1101-10. The inspector determined that a fatal injury was reasonably likely, that two persons were affected, that the violation was S&S, and that it was the result of the operator's high negligence. A penalty of $11,306 has been proposed.

a. **The Violation**

DiLorezo conducted an inspection of the mine's fire suppression system at the 5C belt drive during the course of his regular inspection on April 30, 2009. The fire suppression system installed on the drive is a sprinkler system and, when tested, the system shut the belt off but no alarm, either audible or visible, was given. (Tr. 916). As a result, Lorenzo cited a violation of the regulations that requires "each water sprinkler system shall be equipped with a device designed to stop the belt drive in the event of a rise in temperature and each such warning device shall be capable of giving both an audible and visual warning when a fire occurs." 30 C.F.R.§ 75.1101-10.

DiLorenzo tested the warning system a second time with the same results. The alarm, when triggered, is relayed to a surface manned location and the tracker calls down to the area to alert them to a fire. (Tr. 917). Since the alarm is monitored at the surface, DiLorenzo was able to learn that it was not functioning when the surface person failed to call down about the alarm. Finally, after the second try, they placed a call to the surface monitor to inquire about the alarm. The surface monitor confirmed that the alarm had not been sent. The Respondent has stipulated to the violation and, therefore, I find that the violation occurred as set forth in the citation. (Tr. 969).

b. **Significant and Substantial**

DiLorenzo avers that the violation creates a hazard that would lead to a fatal injury. In his view, the hazard is not having an audible alarm or warning when there is a belt fire. The lack of an audible alarm translates into a miner entering an area without knowing of, or being prepared for, a fire. Persons would enter the subject area either for routine checks, or because the belt is off, but have no knowledge of a fire because the alarm would not have sounded. Panic or confusion may ensue and lead to exposure to fire or smoke. In addition, those fighting the fire would be exposed to burns and smoke inhalation resulting in a fatal injury. This is a belt drive transfer point and, consequently, there is coal as well as hydraulic and gear oil nearby. This area is also near the working area and, since the air travels inby, the smoke would reach the workers and they would be overcome by smoke and flames. In DiLorenzo's opinion, given that miners rely on the warning system to avoid entering a smoke or fire filled area, the lack of the audible alarm system is reasonably likely to lead to a fatal accident. Without the alarm, miners would enter the area without being prepared for the conditions and may panic or become disoriented.

I have found that there is a violation of a mandatory standard and that the violation demonstrates a discrete safety hazard, that of a faulty alarm which fails to adequately warn the

miners of a fire on the belt. This is the same fire suppression system discussed in the docket above that was cited for an inadequate examination. In the earlier discussion DiLorenzo described the importance of warning the crew in the event a fire erupted on the belt.

Air Quality asserts that the violation is not S&S because the mine would have detected the malfunctioning notification system during the next weekly examination, and because there are many other safety measures in place in the case of a belt fire. Further, the mine's CO detectors are activated before a fire breaks out, which will, in turn, activate flashing lights in the section. Moreover, there is fire fighting equipment, including the sprinkler system that was intact. Essentially, Air Quality argues that the other mandated safety precautions would negate the likelihood of a fire on the belt and that other warning devices were in place. The Federal Mine Safety and Health Commission, relying on *Buck Creek Coal, Inc.*,52 F.3d 133, 136 (7th Cir. 1995), has rejected arguments that after-the-fact safety systems such as carbon monoxide detectors, fire suppression systems, and fire retardant belts reduce the likelihood of serious injury. The Seventh Circuit, in upholding the decision of the ALJ regarding the serious nature of the accumulations, determined that the presence of other safety measures to deal with a fire does not mean fires are not a serious safety hazard, as the precautions are in place because of the "significant dangers associated with coal mine fires." *Id.*

DiLorenzo's testimony does not address the likelihood of a fire on the belt and, therefore, standing alone, it is not enough to substantiate a finding of S&S. However, when taken with the other testimony presented in these dockets as a whole, the result is different. The parties have stipulated that "[t]he Secretary and Black Beauty are free to argue that evidence admitted in the context of a particular Citation or Order is relevant to the court's determination of other Citations and Orders. Further, if the Court accepts the party's argument, the Court may consider that evidence in reaching her decision concerning those other Citations and Orders."Jt. Ex. 1, Stip. 11. The record is replete with testimony about accumulations rubbing in the belt at this mine, as well as other types of accumulations and ventilation violations. The record also includes testimony that the mine is a gassy mine on a five day spot inspection, and that a fire is likely to occur on the belt. Given that a fire is likely to occur, and that the audible warning to alert miners of that fire was not working, a hazard is created that would lead to a reasonably serious injury. Therefore, I find the violation to be S&S.

c. **Negligence**

In Docket No. LAKE 2009-569, I discussed the testimony of DiLorenzo, as well as various witnesses for the mine, when I addressed the issue of an inadequate weekly examination of the fire suppression system. I refer back to that testimony here. DiLorenzo designated the negligence for this violation as high. He explained that his primary reason for the high negligence was the extensive work that was necessary in order to repair the visible warning device, in addition to his belief that the condition had existed for some time. Both reasons were refuted by the witnesses for Air Quality. Bedwell, who was responsible for the repair, testified that, although it took a little time to find, an electrical wire had been knocked loose, thereby

causing the warning to malfunction. A number of witnesses testified that the condition had not existed for long as DiLorenzo believed. Further, the mine produced records to demonstrate that it had been functioning. The mine observed that the system was functioning when the weekly check was last complete, and attests that they would have found this problem during the next weekly check. In considering all of the testimony, I find that the negligence was not high and was, instead, moderate. I assess a penalty of $6,000.

6. *Citation No. 8415368*

On May 6, 2009, Inspector Phillip Herndon issued a citation to Air Quality for a violation of 30 C.F.R § 75.400 for accumulation of combustible material. The citation alleges the following:

> There was an accumulation of coal fines, fine belt shavings and coal dust, black in color and dry to the touch at cross cut No. 159 along the 3 West C belt line. The accumulation measured approximately 2 feet wide by 2 feet long by 6 inches to 10 inches deep. The belt frame work was warm to the touch w[h]ere the belt was cutting into the framework at this location by approximately 2 inches and was also turning in the accumulation of combustible material.

Herndon determined that the violation was reasonably likely to cause an injury that resulted in lost workdays or restricted duty, that three persons were affected, that the violation was S&S, and that it was the result of the company's high negligence. A penalty of $10,437 has been proposed.

a. **The Violation**

Inspector Herndon has been an MSHA inspector for four years and has been working in mining since 1982. (Tr. 672). He conducted an inspection of the Air Quality mine on May 6, 2009. While walking the three west C belt line, he found an accumulation of coal at crosscut 159. The accumulation was located underneath the belt line and was up against the roller and the framework of the belt. (Tr. 675). He noticed that the accumulation was black in color, 100 percent coal, and it was dry to the touch. The belt was operating, but it had cut two inches into the framework, causing it to be out of alignment. (Tr. 676-677). The accumulation was warm to the touch due to "the friction of the belt it was cutting into the frame [and] heat was being generated through the frame into the pile of accumulation and the . . .roller [was] actually turning in the accumulation." (Tr. 678). The accumulation was made up of small coal fines, fine belt shavings and coal dust. Herndon testified that, if left in this condition, a fire would definitely occur. As a result, Herndon issued a citation for a violation of 30 C.F.R. § 75.400, which prohibits the accumulation of combustible material in any active working section of the mine.

Hammond accompanied Herndon and testified on behalf of Air Quality. According to

Hammond, the belt had been modified in that particular area to allow scoops to dump. Hammond described seeing coal and rock on the floor, and accumulated material in contact with the roller. In his opinion it was not extensive and was only a small accumulation. (Tr. 732). It is his view that the majority of the material was from the spillage from the scoop since it was in a concise area and he saw no evidence of spillage off the belt. (Tr. 734). However, he did agree that the belt had to be realigned in order to terminate the citation.

I find that an accumulation of combustible material existed in the active working, and that the Secretary has established a violation of the cited standard.

b. **Significant and Substantial**

According to Herndon, the danger that is presented by the accumulation is that of a fire occurring which will, at a minimum, lead to a lost workdays or restricted duty injury. The injury would be smoke inhalation or burn related and would affect at least three persons. (Tr. 680). Herndon testified that, given the condition he observed, including the combustible material and ignition source, it was reasonably likely that a fire would break out. Fires on belt lines are serious hazards, and lead to burns, smoke inhalation, or worse. For example, the 2005 Aracoma belt fire involved an accumulation. That fire resulted in the loss of two miners. Here, a friction ignition source is presented by the belt running on the frame and the belt turning in the coal. The accumulation of coal dust and fines would be ignited if the belt continued to turn in the coal. The combustible material, combined with the ignition source, is likely to lead to a fire or explosion. (Tr. 680). Herndon believed that this accumulation was S&S given that coal dust is a serious hazard and will lead to an fire or explosion.

The mine operator argues that all of the other protections required by the Mine Act and its regulations, which it alleges were properly in place at the time of the order, reduced the possibility of an injury producing event, thereby rendering it non-S&S. The Courts and the Commission have found to the contrary. *In Buck Creek Coal*, 52 F.3d 133, 136 (7th cir. 1995), the mine operator argued that carbon monoxide detectors, a fire-retardant belt, a fire suppression system, a fire brigade team, a rescue team, fire fighting equipment and ventilation all undermined the likelihood of a serious injury that would result from a coal accumulation violation. The Seventh Circuit, in upholding the decision of the ALJ regarding the serious nature of the accumulations, determined that the fact that there are other safety measures in place to deal with a fire does not mean that fires are not a serious safety hazard and, rather, the precautions are in place because of the "significant dangers associated with coal mine fires." *Id.* While extra precautions may help to reduce some risks, they do not make accumulations violations non-S&S.

The Commission has addressed the issue of accumulations and conveyor belts a number of times. In *Amax Coal Co.*, 19 FMSHRC 846 (May 1997), the Commission upheld an ALJ's finding that a belt running on packed coal was a potential source of ignition for extensive accumulations of loose, dry coal and float coal dust along a belt line, and that the condition

presented a reasonable likelihood of an injury causing event. In addition, in *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994), the Commission held that accumulation violations may properly be designated as S&S where frictional contact between belt rollers and the accumulations, or between the belt and frame, results in a potential ignition source for the accumulations. The Commission in *Mid-Continent* found that it was immaterial that there was no identifiable hot spot in the accumulations because continued normal mining operations must be taken into account when evaluating the circumstances. In the present case, if the violative condition had been allowed to persist, it would have reasonably led to smoke, fire and, potentially, an explosion. Further, an additional potential ignition source was present in the form of the belt rubbing the frame structure, which could generate a spark

I have found a violation of a mandatory standard. Second, I find that the accumulations of coal turning in the belt roller presented a discrete safety hazard, i.e., the danger fire, smoke, or potentially an explosion if left unabated. Third, the above analysis establishes the more than reasonable likelihood that the hazard will result in an injury. Fourth, and finally, the injury would be serious to those fighting the fire, those who inhale the smoke, and any person caught up in an explosion. I credit the testimony of Herndon and find that the violation is S&S.

c. **High Negligence**

Herndon explained that the accumulation violation history at this mine, combined with the notice provided by earlier citations and Herndon advising the mine about the accumulation problem, lead to a finding of high negligence. Sec'y Ex. 63; (Tr. 683). Air quality was cited 102 times for accumulations during the time period from August 22, 2008 until April 30, 2009, i.e., a period of less than one year. Further, Herndon found the date, time and initials to evidence that an examination had been completed 20 minutes before his inspection. In Herndon's view, the accumulation was not only too extensive to have happened right before his arrival, but the two inch cut into the steel frame by the belt demonstrated that it had been ongoing for some time. (Tr. 685-686). In fact, when the belt was examined at 5:00 p.m. the afternoon before the citation, the accumulation must have been present given the condition of the belt and the amount of accumulation. (Tr. 688). I find Herndon to be a credible and thorough witness.

Hammond disagrees that the violation was a result of high negligence. He believes that a scoop had dumped onto the belt just prior to the inspector's arrival, causing the spill, which was common in that area. Further Hammond testified that this was a small accumulation in a limited area and he saw no reason for the negligence to be high. He doesn't know if an examiner or anyone else had been in the area prior to the citation. (Tr. 735). I credit the testimony of Herndon and find that the negligence is high and assess the proposed penalty of $10,437.

7. *Citation No. 8415370*

On May 6, 2009, Inspector Phillip Herndon issued a citation to Air Quality which alleged that "[t]he 3 West B, belt tail was observed turning in an accumulation of coal. The

accumulation measured approximately 2 feet wide by 2 feet long by 8 inches to 16 inches deep." Herndon determined that the violation was reasonably like to cause an injury that would result in lost workdays or restricted duty, that three persons were affected, that the violation was S&S, and that it was the result of the company's high negligence. A penalty of $10,437 has been proposed.

a. **The Violation**

After discovering accumulations on the belt and issuing the citation discussed above, Herndon continued his travels on the 3 west B belt and observed a second accumulation at the tail roller. The accumulation of coal was 2 feet wide by 2 feet long by 8 to 16 inches deep. (Tr 689). The accumulation was under the tail piece, on the floor, and behind the tail roller. There was such an accumulation behind the tail roller that it had conformed to the shape of the belt roller. (Tr. 690). The discharge roller for 3 west C dumps here onto the tail piece of the B belt and Herndon could see that there was a faulty wiper which was causing at least a portion of the accumulation. (Tr. 690). Herndon described the hazard of a fire. He stated that the tail roller was turning in coal and coal fines, meaning that there was a frictional ignition source that, when mixed with the coal fines, would create a fire hazard. The three miners working nearby would be the first to notice the belt fire, attempt to extinguish it, and be exposed to the hazard of smoke inhalation.

Hammond did not dispute that the accumulation described by Herndon was present, but he focused on the safety measures in place to prevent the fire. He did agree that the material was coal, but explained that it contained some incombustible rock. Hammond saw less material than that described by Herndon, i.e., maybe only ten to twelve shovelfuls of coal and rock. I credit the undisputed testimony of Herndon that there was a coal accumulation as he described and find that there was a violation.

b. **Significant and Substantial**

Herndon explained that this violation is S&S based upon his observation of the belt roller turning in the dry coal would created a friction source that could easily ignite the dry coal. A belt fire creates a great deal of smoke and the three men in the area would be exposed to, at a minimum, smoke inhalation. I have already found that there is a violation of the mandatory standard. I find that the violation creates a discrete safety hazard, i.e., the danger of accumulations igniting and causing smoke and fire. Herndon explained that the hazard is reasonably likely to create a fire given the presence of an ignition source and the circumstances that he observed. While the coal was damp in some areas, it was dry under the roller and around the tail piece. I rely not only on Herndon's testimony regarding this accumulation but also his testimony with regard to the accumulation cited above and the hazards that result from accumulations.

Air Quality disputes that the violation was significant and substantial. According to the mine, when coal and rock move down the belt, sensors are activated, causing the water sprays to

turn on. Coal is moving frequently and hence sprays are activated frequently. Much of the material was coal, but there was also a lot of incombustible rock. Hammond described the coal as moist, and being shaped by the belt. (Tr. 736-738). Hammond did not believe that the coal in the belt was an ignition source because it was wet and the water would continue to be applied. The moistness also indicated that the coal accumulation had not existed for the number of hours that Herndon suggested. Hammond did not consider the condition serious, nor as extensive as the inspector described. (Tr. 739). There are belt sprays in place to control dust. Although he agreed that a belt rubbing the frame of the conveyor would create heat, it is not enough to start a fire.

As discussed in connection with the accumulation citation above, the Commission has addressed the issue of accumulations and conveyor belts in the context of an S&S analysis. *Amax Coal Co.*, 19 FMSHRC 846 (May 1997); *Mid-Continent Resources, Inc.*, 16 FMSHRC 1218, 1222 (June 1994). In any event, even if the coal was wet, the Commission has recognized that wet coal can dry out and ignite. *See Black Diamond Coal Mining Co.*, 7 FMSHRC 1117, 1121 (Aug. 1985).

The mine operator argues that all of the other protections required by the Mine Act and its regulations, which it alleges were properly in place at the time of the order, reduced the possibility of an injury producing event, thereby rendering it non-S&S. I have discussed this issue a number of times above and relying on *Buck Creek Coal*, 52 F.3d 133, 136 (7th cir. 1995) find that the other safety measures in place do not make the accumulations non S&S.

I credit Herndon's testimony in general regarding accumulations, and specifically as it applies to this violation. I find that the violation is S&S.

c. **Negligence**

Herndon indicated on his citation that this violation was the result of high negligence. The examiner had traveled through the area at 9:24 a.m. and Herndon arrived 11:12 a.m. By the time Herndon arrived, the coal was compact and compressed, as well as damp, but the accumulation under the roller and under the tail piece was dry. Thus, Herndon believed that the condition had existed for at least several hours. Hammond, on the other hand, asserts that the condition was present for 30 minutes or less based upon what he observed at the location. He testified that it took only a short time to shovel to abate the condition, so it could not have been as extensive as the inspector described. (Tr. 741). In reviewing all of the evidence, I find that the Secretary has not demonstrated that the violation was a result of high negligence and, therefore, I assess a penalty of $7,500.

8. *Citation No. 8415371*

While Herndon was at the mine on May 6, 2009, he issued this citation for a violation of a safeguard. The citation alleges the following:

> The travelway along the 3 West belt line at cross cut No. 83 was not being maintained free of mud and water as required by Safegaurd No. 7591942-03. There was an incline from both directions covered in slick mud creating a slip hazard. At the bottom of the incline was a hole filled with black, murky, wet, mud measuring approximately 15 feet long by 10 feet wide by 2 feet deep.

Herndon determined that the violation was reasonably likely to cause an injury that would result in lost workdays or restricted duty, that one person was affected, that the violation was S&S, and that it was the result of the company's moderate negligence. A penalty of $1,026 has been proposed.

a. **The Violation**

Herndon issued a 104(a) citation on May 6, 2009, for a safeguard violation at the 3 west C belt near the area where he had discovered accumulations of coal on the belt. At crosscut 83 he found mud and water along the belt line, making it nearly impossible to pass. The walkway inclined in both directions along the belt and was covered with slippery mud. Herndon testified that "[a]t the bottom of the incline was a hole filled with black, murky, wet mud[.]" He explained that "[e]verything around [the area] was muddy and slick. Very, very small area to pass through it was timbered along the edge." (Tr. 697). The condition created a slip, trip and fall hazard. The safeguard at issue, Safeguard No. 7591942-03, could be found in the in the mine file. Sec'y Ex. 46. Herndon reviewed the safeguard prior to his inspection and carried a summary of the safeguards with him. The safeguard requires a clear travelway of at least 24 inches. Contrary to the assertion of the mine, Herndon testified that there were no planks or other material available to assist walking over or around the mud and water.

Hammond, on the other hand, testified that there were two planks, each 10 to 12 inches wide, that were parallel to and on the "travelway side going up the incline." (Tr. 743). He saw no hazard in the area, but he does not deny that there was not a 24 inch clear travelway. I note that Hammond did not describe the length of the planks, nor their position over the hole that Herndon described. Hammond testified that he did walk on the planks and was able to pass through without falling.

Kenny Benedict, an MSHA inspector and health specialist, had been with MSHA for about four years prior to the time in question. Prior to working for MSHA, he worked in numerous positions for 31 years at Old Ben Coal Company. (Tr. 590-591). In August, 2007, while a trainee inspector, he traveled with Johnny Moore when the modification to the notice to provide safeguard 7591942-03 was initially written. (Tr. 591, 603). Together they examined the belt line from one end to the other and discovered that the large quantity of water spraying onto the conveyor was causing water and mud to accumulate along the beltway. Benedict recalled that, in one area, he refused to walk through the water and mud and, instead, chose to walk

around. However, Inspector Moore went through the water and had water and mud up to his knees. According to Benedict, on the day the modification was made there was no clear travelway on the edge of the water which was rib to rib and existed for a distance of 25-30 feet. (Tr. 593); Sec'y Exs. 46 and 61. The modification of the safeguard states that mud and water must be kept a clear of the 24 inch travelways on each side of the belt. (Tr. 601, 603). On cross-examination Benedict explained that the original safeguard had to do with debris, and this modification was necessary to address the more specific hazard of mud and water, but since it was along the same travelway along the belt line, a new safeguard was not appropriate. Instead, a modification was the correct way to address the issue of water and mud. Both the original safeguard and the modification address maintaining a clear walkway of 24 inches along the belt.

DiLorenzo testified regarding the original safeguard issued on May 7, 2003. He indicated that the original safeguard referred to rock, coal, or debris that prohibited clear travel in the walkway. The modification, relied on by Herndon for this violation, required that the travelway must also be free of mud and water. According to DiLorenzo, the original safeguard, addresses a rib roll at crosscut 17. Sec'y Ex. 45; (Tr. 843-844).

Black Beauty alleges that the notice to provide safeguard and its subsequent modification are invalid and, therefore, the citation issued for a violation of such should be vacated. Black Beauty makes two arguments in support of its motion. First, Black Beauty argues that the notice to provide safeguard as originally issued, and the second modification of that safeguard, do not specifically identify a hazard. Second, Black Beauty argues that the second modification of the notice to provide safeguard does not provide any "indication that it was based on specific conditions that actually existed at the mine." BB Mot. to Dismiss 6.

I have addressed the issues raised by Black Beauty in my earlier ruling on a motion to dismiss. I further addressed the issues in my discussion above of the safeguard violation issued by DiLorenzo. The same reasoning and ruling apply to this citation. I find that the modification to the safeguard was issued as a result of conditions found at the mine at the time it was issued. I further find that the safeguard identifies with necessary specificity the nature of the hazard at which it is directed, and that it clearly sets out the conduct required to remedy the hazard, i.e., removal of the water and mud. *Southern Ohio Coal Co.*, 7 FMSHRC 509, 512 (Apr. 1985); *Cyrus Cumberland Resources Corp.*, 19 FMSHRC 1781, 1784-1785 (Nov. 1997). Since it is undisputed that the travelway was not clear, I find that a violation has been established.

b. **Significant and Substantial**

The mud and water created a slip, trip, and fall hazard. The water was murky and dark, making it impossible to see the bottom as it was traversed. The area was slippery and Herndon fell while attempting to navigate through the mud and water. (Tr. 699-700). In his view, it is reasonably likely that anyone who needed to get through the area would slip and fall in the travelway. A slip and fall would result in a blow to the head, cuts, twisted ankles, broken bones, or any other number of injuries. (Tr. 699). The following exchange between Herndon and

counsel for the Secretary is telling:

> Q: How did you fair when you encountered the muddy water?
> A: I busted my butt in this location.
> Q: Okay. How likely was it that if the mud and water had - muddy water had remained in the travelway a miner would have suffered injuries which had (sic) caused him to lose work or be placed on restricted duty?
> A: Reasonably likely.
> Q: Okay. And why do you say that?
> A: Because I fell
> Q: Okay.
> A: Absolutely 100 percent sure that it would be easy to fall.

(Tr. 699-700).

Hammond did not believe that the water and mud were a hazard, but did see Herndon fall. I credit Herndon's testimony about the hazard and the likelihood that an injury would occur as a result of the hazard. Further, the injury would be of a reasonably serious nature. Therefore, I find the violation to be S&S.

Herndon designated the negligence as moderate even though he testified that, while the water had been in place for some time, the examiner did not note or remedy the problem. Herndon's testimony lacks sufficient facts to support a negligence finding higher than moderate. In light of the foregoing analysis, I assess the penalty of $1,026 as proposed by the Secretary.

9. *Citation Nos. 8415372 and 8415373*

Both of these citations were issued based upon the notice to provide safeguard that requires a clear 24 inch travelway along the belt. I have ruled on the issues raised by the operator, both in the order denying their motion to dismiss and in discussing the safeguard above. Those rulings apply here. The parties have agreed to not submit any further evidence with regard to either citation. As a result, the two citations that remain at issue, Citation Nos. 8415372 and 8415373, were not addressed at hearing and, instead, the parties submitted the following: "Black Beauty stipulates that the only defenses they are raising concerning Citations 8415372 and 8415373 are (1) the Citation must be vacated because the underlying Safeguard is invalid and (2) the Court could not find the violations to be significant and substantial because safeguards are not mandatory standards." Jt. Ex. 1, Stip. 15. The parties further "stipulate that neither will present evidence particular to Citations 8415372 and 8415373." Jt. Ex. 1, Stip. 16. Accordingly, I affirm the citations as issued and assess the proposed penalty of $3,405 for each of the violations

.

10. *Citation No. 8415379*

On May 15, 2009 Inspector Douglas Herndon issued a citation that alleged a violation of section 75.220(a)(1) for the mine's failure to follow its approved roof control plan. The citation alleges the following:

> The approved roof control plan was not being followed on the MMU-003. A remote controlled continuous miner operator was observed positioned in the Red Zone between the coal rib and the continuous miner as it was being trammed past his body. The condition was a factor that contributed to the issuance of Imminent Danger Order number 8415378 dated 5/14/2009.

Herndon determined that the violation was highly likely to cause a fatal injury, that one person was affected, that the violation was S&S, and that it was the result of the company's moderate negligence. A penalty of $9,122 has been proposed.

a. **The Violation**

On May 14, 2009 Herndon was on the MMU-003 section. As he approached the mining area he observed the continuous miner backing out from a cut. (Tr. 773-774). Herndon could not see the miner operator as the miner backed out from the cut. Herndon hurried through the crosscut and found the miner operator between the rib and miner. (Tr. 774, 776-777). He immediately issued an imminent danger order because the miner operator was in the "red zone". (Tr. 778-779). The red zone is the area between the continuous miner and the rib where the miner operator is in jeopardy of being pinned between the two. It is considered a red zone only if the pump motor is on, as it was in this case. (Tr. 779). The Air Quality roof control plan prohibits the miner operator from placing himself in the red zone. Sec'y Ex. 34; (Tr. 779-780). The roof control plan requires miners to stay out of the danger zone while tramming the miner. If it is necessary to travel between the machine and the rib, the operator must deactivate the machine by turning the pump motor off. (Tr. 781). When Herndon arrived, there was no one else in the immediate vicinity besides the miner operator. The miner operator told Herndon that he was aware of the danger of operating the miner while in the red zone, but said he was focused on keeping cables from being run over. (Tr. 782). The miner operator had two years of mining experience with six months as continuous miner operator. *Id.*

The operator does not dispute that the continuous miner operator was in the red zone between the continuous miner and the rib, and that his actions violated the roof control plan as described by Herndon. Sec'y Ex. 34, pp. 10 and 11; (Tr. 780-781, 834). After conducting an internal review of the matter, the operator terminated the employment of this miner for working in the red zone. (Tr. 806). Thus, I conclude that there is a violation of the roof control plan as alleged.

b. **Significant and Substantial**

Working in the red zone, with the pump motor in the on position, creates a hazard of the miner operator being crushed between the equipment and the ribs, resulting in serious injury or death. Two such fatalities have occurred in this district, including one at the Air Quality mine. (Tr. 783). According to Herndon, there have also been at least two miners permanently disabled in the same district as a result of working in the red zone. (Tr. 783-784). A miner working between the rib and the machine is standing in an area that is uneven, sloping back from the face, often slippery and wet, and often muddy; all while he has a remote control device in his hand. Herndon stated that it is highly likely that, based upon the position of the operator in the red zone, between the rib and the machine on uneven ground, the operator will be seriously injured or killed. (Tr. 784).

Mike Middlemas testified on behalf of the operator. He has been the safety manager at the Air Quality mine for a year and a half and has a total of four and a half years experience as a mine safety manager for Peabody. (Tr. 802-803). He met with Boyd, the continuous miner operator, and witnessed Boyd sign a statement regarding the red zone citation. (Tr. 804) Subsequently, the operator terminated Boyd's employment because he violated a "cardinal" safety rule. (Tr. 806). Air Quality mine management communicates the red zone policy to miners during 40 hour orientation training and covers it in safety talks throughout the year. (Tr. 809). The rules, including the rule about the red zone, are also posted and miners are told that if the rules are violated, the miner can be terminated. (Tr. 809-810). Middlemas agreed that a violation of the policy regarding the red zone can result in a serious injury or a fatality. (Tr. 810, 823). The operator did present one witness, Cameron McCallister, who stated that it was not likely that Boyd would have inadvertently enabled the machine while in the red zone because "it takes a little bit to get it to enable." (Tr. 829-830).

I have found a violation of a mandatory standard. Next, I find that the violation contributes to a discrete safety hazard, that of being crushed while standing in an uneven, potentially slippery area between a large energized mining machine and the rib. I find that the hazard is likely to lead to an injury and that the injury will be serious or even fatal. This is, without a doubt, a S&S violation.

c. **Negligence**

Although Herndon designated the violation with moderate negligence, both parties focused large parts of their evidence on negligence. Herndon testified that approximately one week before issuing this citation he issued a different citation for a red zone violation at the Air Quality mine. (Tr. 785). The operator highlighted the mine's safety rules and the training provided to miner operators regarding the red zone. (Tr. 809, 812).

The miner operator, Boyd, was an hourly employee. The Commission has long held that the negligence of a "rank-and-file" miner cannot be imputed to the operator for civil penalty

purposes. *Fort Scott Fertilizer-Cullor, Inc.*, 17 FMSHRC 1112, 1116 (July 1995); *Western Fuels-Utah, Inc.*, 10 FMSHRC 256, 260-61 (Mar. 1988); *Southern Ohio Coal Co.*, 4 FMSHRC 1459, 1464 (Aug. 1982) ("SOCCO"). Specifically, the Commission has stated that: "[W]here a rank-and-file employee has violated the act, the operator's supervision, training and disciplining of its employees must be examined to determine if the operator has taken reasonable steps necessary to prevent the rank-and-file miner's violative conduct." SOCCO at 1464. Given that Boyd was trained, and the mine made reasonable efforts to alert employees to the dangers associated with the red zone, I conclude that the violation is the result of moderate negligence and assess the penalty of $9,122 as proposed.

## II. PENALTY

The principles governing the authority of Commission administrative law judges to assess civil penalties de novo for violations of the Mine Act are well established. Section 110(I) of the Mine Act delegates to the Commission and its judges the "authority to assess all civil penalties provided in [the] Act." 30 U.S.C. § 820(I). The Act delegates the duty of proposing penalties to the Secretary. 30 U.S.C. §§ 815(a), 820(a). Thus, when an operator notifies the Secretary that it intends to challenge a penalty, the Secretary petitions the Commission to assess the penalty. 29 C.F.R. § 2700.28. The Act requires, that in assessing civil monetary penalties, the Commission [ALJ] shall consider the six statutory penalty criteria:

> [1] the operator's history of previous violations, [2] the appropriateness of such penalty to the size of the business of the operator charged, [3] whether the operator was negligent, [4] the effect on the operator's ability to continue in business, [5] the gravity of the violation, and [6] the demonstrated good faith of the person charged in attempting to achieve rapid compliance after notification of a violation.

30 U.S.C. § 820(I).

I accept the stipulation of the parties that the penalties proposed are appropriate to this operator's size and ability to continue in business and that the violations were abated in good faith. The history shows the past violations at this mine, including citations for the standards discussed above. The size of the operator is large. I have discussed the negligence and gravity associated with each citation and, except where noted, I accept the designations as set forth in each citation. I assess the following penalties:

| Docket No. LAKE 2009-569 | |
|---|---|
| Citation No. 9942563 | $ 20,000.00 |
| Order No. 8415738 | $ 4,000.00 |
| Order No. 7522964 | $ 5,000.00 |
| Order No. 8415756 | Vacated |

Docket No. LAKE 2009-570

| | |
|---|---|
| Citation No. 8415735 | $ 2,500.00 |
| Citation No. 8415779 | $ 5,000.00 |
| Citation No.7445937 | $ 10,000.00 |
| Citation No.7445941 | $ 2,000.00 |
| Citation No.8415754 | $ 6,000.00 |
| Citation No. 8415368 | $ 10,437.00 |
| Citation No. 8415370 | $ 7,500.00 |
| Citation No. 8415371 | $ 1,026.00 |
| Citation No. 8415372 | $ 3,405.00 |
| Citation No. 8415373 | $ 3,405.00 |
| Citation No. 8415379 | $ 9,122.00 |
| **Total**: | $ 89,395.00 |

The parties have settled the remaining citations and orders contained in these dockets. The settlement terms are as follows:

| Citation/Order No. | Originally Proposed Penalty | Settlement Amount | Modifications |
|---|---|---|---|
| **LAKE 2009-569** | | | |
| 8415376 | $4,000.00 | $4,000.00 | |
| **Docket Total** | $4,000.00 | $4,000.00 | |
| | | | |
| **LAKE 2009-570** | | | |
| 8415331 | $3,143.00 | $635.00 | Reduction in gravity to Unlikely and Non-S&S. |
| 8415716 | $1,026.00 | $207.00 | Reduction in gravity to Unlikely and Non-S&S. |
| 8415718 | $8,209.00 | $6,567.00 | |
| 8415719 | $3,405.00 | $2,724.00 | |
| 8415335 | $634.00 | $191.00 | Reduction in gravity to Lost Workdays or Restricted Duty. |
| 8415338 | $3,143.00 | $2,514.00 | |
| 8415724 | $1,203.00 | $1,203.00 | |
| 6675755 | $362.00 | $362.00 | |

| | | | |
|---|---|---|---|
| 8415734 | $5,961.00 | $5,961.00 | |
| 8415737 | $3,143.00 | $2,514.00 | |
| 6681988 | $8,893.00 | $500.00 | Reduction in gravity to Unlikely, Non-S&S, and 4 persons affected. |
| 6681826 | $1,795.00 | $688.00 | Reduction in gravity to 4 persons affected. |
| 6675756 | $1,530.00 | $1,203.00 | Reduction in gravity to 1 person affected. |
| 6681989 | $5,961.00 | $4,769.00 | |
| 6675757 | $1,026.00 | $207.00 | Reduction in gravity to Unlikely and Non-S&S. |
| 8415348 | $5,503.00 | $1,112.00 | Reduction in gravity to Unlikely and Non-S&S. |
| 8415741 | $3,689.00 | $3,689.00 | |
| 6675758 | $2,282.00 | $874.00 | Reduction in gravity to 4 persons affected. |
| 6675759 | $1,657.00 | $634.00 | Reduction in gravity to 4 persons affected. |
| 6675760 | $2,282.00 | $874.00 | Reduction in gravity to 4 persons affected. |
| 6675761 | $6,996.00 | $6,996.00 | |
| 8415744 | $4,329.00 | $2,405.00 | Reduction in gravity to Unlikely and Non-S&S. |
| 6681992 | $10,437.00 | $807.00 | Reduction in gravity to Unlikely, Non-S&S, and 4 persons affected. |
| 8319878 | $224.00 | $224.00 | |
| 8491715 | $8,893.00 | $1,796.00 | Reduction in gravity to Unlikely and Non-S&S. |
| 8415751 | $1,412.00 | $800.00 | Reduction in gravity to Unlikely and Non-S&S. |
| 8319880 | $100.00 | | Vacated. |
| 7421674 | $3,143.00 | $634.00 | Reduction in gravity to Unlikely and Non-S&S. |
| 6681993 | $5,503.00 | $4,440.00 | Reduction in gravity to 4 persons affected. |
| 7421675 | $11,306.00 | $2,282.00 | Reduction in gravity to Unlikely and Non-S&S. |
| 7054587 | $12,248.00 | $243.00 | Reduction in gravity to Unlikely, Lost Workdays or Restricted Duty, Non-S&S, and 3 persons affected. |
| 8415357 | $745.00 | $745.00 | |

| | | | |
|---|---|---|---|
| 8415755 | $100.00 | | Vacated. |
| 9942569 | $18,271.00 | $3,406.00 | Reduction gravity to 7 persons affected. Reduction in negligence to Moderate. |
| 8415759 | $5,961.00 | $5,961.00 | |
| 7445931 | $2,678.00 | $541.00 | Reduction in gravity to Unlikely and Non-S&S. |
| 7445933 | $2,678.00 | $541.00 | Reduction in gravity to Unlikely and Non-S&S. |
| 7445935 | $2,473.00 | $500.00 | Reduction in gravity to Unlikely and Non-S&S. |
| 8415766 | $946.00 | $946.00 | |
| 8415369 | $1,944.00 | $1,203.00 | Standard violated modified to 75.1731(a). |
| 7445936 | $1,657.00 | $1,657.00 | |
| 7445938 | $946.00 | $946.00 | |
| 7445942 | $2,678.00 | $541.00 | Reduction in gravity to Unlikely and Non-S&S. |
| 7445946 | $2,473.00 | $500.00 | Reduction in gravity to Unlikely and Non-S&S. |
| 8224833 | $1,795.00 | $1,795.00 | |
| 8224835 | $1,795.00 | $363.00 | Reduction in gravity to Unlikely and Non-S&S. |
| 8415778 | $946.00 | $946.00 | |
| 8415780 | $5,961.00 | $5,961.00 | |
| 8415375 | $2,106.00 | $2,106.00 | |
| 8415377 | $334.00 | $334.00 | |
| 8415786 | $1,026.00 | $309.00 | |
| 8224846 | $5,961.00 | $1,203.00 | Reduction in gravity to Unlikely and Non-S&S. |
| **Docket Total** | $192,912.00 | $88,559.00 | |
| **Overall Total** | $196,912.00 | $92,559.00 | |

I have considered the representations submitted by the parties and I conclude that the proposed settlement is appropriate under the criteria set forth in section 110(I) of the Act. The motion to approve settlement is **GRANTED**.

## III. ORDER

Based on the criteria in section 110(I) of the Mine Act, 30 U.S.C. § 820(I), I assess a total penalty of $181,954.00 for both the citations and orders that were heard and those that were settled. Black Beauty Coal Company is hereby **ORDERED TO PAY** the Secretary of Labor the sum of $181,954.00 within 30 days of the date of this decision.

Margaret A. Miller
Administrative Law Judge

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